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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 28

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, APPELLEES

No. 38

CHARLES E. BRUNDAGE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, APPELLEES

No. 43

CITY OF AUBURN, APPELLANT

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, APPELLEES

No. 44

LIVINGSTON ANTI-MERGER COMMITTEE, APPELLANT

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, APPELLEES

On Appeals from the United States District Court for the District of Columbia

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BRIEF OF THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (App. 1-58) is reported at 296 F. Supp. 853. The reports of the Interstate Commerce Commission (App. 61-503) are printed at 331 I.C.C. 228; 331 I.C.C. 869; and 333 I.C.C. 391.

JURISDICTION

The judgment of the district court was entered on November 20, 1968 (App. 59-60). The notice of appeal in No. 28 was filed December 5, 1968, and the notices of appeal in Nos. 38, 43, and 44 were filed on December 20, December 5, and December 12, 1968, respectively. Probable jurisdiction was noted on February 24, 1969, and the cases were consolidated. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2325.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1, and relevant portions of Section 5 of the Interstate Commerce Act, as amended, 49 U.S.C. 5, are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

1. In No. 28, the appeal of the United States:

Whether the Interstate Commerce Commission's approval of the merger of the Great Northern and Northern Pacific railroads and subsidiaries—with conditions—as consistent with the public interest,

implements the Congressional policy as to railroad unification and is supported by findings based upon substantial evidence.

2. In No. 38, the appeal of Brundage, et al. constituting the Northern Pacific Stockholders' Protective Committee:

Whether the Commission erred in finding that the merger stock exchange ratios, as between the stockholders of Great Northern and of Northern Pacific, were "just and reasonable."

3. In No. 44, the appeal of the Livingston Anti-Merger Committee:

Whether this appeal, challenging the validity of the title of Northern Pacific to the properties which it has long operated, presents any ground for reversal.

4. In No. 43, the appeal of the City of Auburn, Washington:

Whether this appeal presents any consideration militating against approval of the proposed merger which required greater consideration than accorded by the Commission and by the court below.

STATEMENT

These are appeals by the Department of Justice, certain minority stockholders of the Northern Pacific Railway Company, the City of Auburn, Washington, and the Livingston Anti-Merger Committee [1] from

[1] The State of Washington, the Board of Railroad Commissioners of Montana, and the Public Service Commission of

the judgment of the United States District Court for the District of Columbia (Chief Judge Bazelon, Senior Circuit Judge Fahy, and Chief Judge Curran) unanimously sustaining the Interstate Commerce Commission's approval, pursuant to Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)), of the proposed merger of the Great Northern Railway Company (GN) and the Northern Pacific Railway Co. (NP) (together referred to as the Northern Lines). Included in the transaction are: the Chicago, Burlington & Quincy Railroad Company (CB&Q) (97.18% of whose stock has long been owned in equal proportions by GN and NP); and the Pacific Coast R.R. Co. (a wholly owned subsidiary of GN). The Commission further authorized the merged company to lease the properties of the Spokane, Portland & Seattle Railway Company (SP&S)—all of whose stock has been owned in equal shares by GN and NP. The Commission's order also authorized the issuance of securities required to carry out the merger.

A. Description of Lines

The operations and properties of the applicant roads are described in detail in the Commission's First Report (App. 67-73), and in the report of the hearing examiner (App. 537-564). Generally the main routes of the Great Northern and Northern Pacific, known as the "Northern Lines", converge at the Twin Cities and again at Seattle, Spokane, and Portland.

Minnesota were plaintiffs in the court below. The Minnesota Commission filed no brief and made no argument. None of these plaintiffs have appealed to this Court.

(See Map, Appendix A, Brief of Great Northern et al.) Between these extremities each operates over a different part of the "Northern Tier" states—a term used in this case with reference to Minnesota, North Dakota, Montana, and Washington.

Through much of this territory, including virtually all of North Dakota and Montana, the two lines are separated, often by one hundred or more miles (App. 316, 770). Each road serves certain points and areas not reached by the other. As the lower court stated, "West of Minnesota, Great Northern serves primarily those communities lying to the north while Northern Pacific serves the southern parts of these states" (App. 11). GN, but not NP, reaches California, South Dakota, and Iowa, and serves such cities as Great Falls, Montana; Minot, North Dakota; and Wenatchee, Washington. On the other hand, NP, but not GN, serves such points as Yakima, Washington; Missoula and Bozeman, Montana; and Bismarck, North Dakota. Montana cities such as Helena, Butte, and Billings are on the NP east-west main line, but on indirect north-south branches of the GN.

There are generally three corridors for transcontinental traffic moving across the western part of the country: the northern, central, and southern corridors. GN and NP, together with SP&S which they own—and which cuts across southern Washington to connect Spokane with Portland—constitute part of the service available across the northern corridor. Several other carriers compete in that same corridor. The Chicago, Milwaukee, St. Paul and Pacific (Mil-

waukee) operates main-line service from major Northwest points such as Seattle, Spokane, and Tacoma; through Missoula and Butte to the Twin Cities; and on from there to Chicago. That the Milwaukee's transcontinental service across the Northern Tier involves "shorter routes and superior grades" (App. 321) is not questioned. As a result of the instant merger, as approved by the Commission, the Milwaukee was the beneficiary of a number of vitally important conditions designed to strengthen its competitive role. See *infra*, pp. 83-87. Union Pacific (UP) offers transcontinental service from Seattle, Tacoma, and Portland; operates a Spokane line which largely parallels the SP&S; and has a branch directly connecting Butte and certain other Montana points with its cross-country line. Finally the Soo Line-Canadian Pacific route operates from Chicago, through either the Twin Cities or Superior, across Minnesota and North Dakota, into Canada and across to the northern border of Idaho—where it connects with a UP subsidiary—and continues to Spokane. In addition to UP, several other roads supply competitive transcontinental routes.

B. Proceedings Before the Commission

The merger application was filed with the Commission in February 1961. Eighty-two days of hearings before a hearing examiner in sixteen cities in the area served by the applicant railroads were held. Participants in the case included the United States Departments of Justice and Agriculture, several states and municipalities, labor groups, the appellant NP

stockholders group, other railroads, and hundreds of shippers, associations, and civil groups. In August 1964, the hearing examiner issued an extensive report and order recommending approval of the merger, subject to various conditions. (App. 517 *et seq.*).

1. *The First Report*

Following oral argument, the Commission, in March 1966, by a vote of 6-to-5, issued its decision (the First Report) disapproving the proposed merger (App. 61 *et seq.*). The majority of the Commission concluded that "the disadvantages of an appropriately conditioned merger—a drastic lessening of competition and adverse effects on carrier employees—outweigh the benefits that might be derived by applicants and the shipping public" (App. 166-167). The First Report noted that "With regard to the nonmonetary benefits [of the proposed merger], it is clear that many shippers would receive better transportation service" (App. 161).

The Chicago & North Western Railway Company (North Western) and the Milwaukee had opposed the merger unless drastic conditions were imposed to protect them from its competitive impact. The Northern Lines contended that imposition of the requested conditions would be so costly as to deprive the merger of substantial benefits. This led the Commission to conclude (App. 93) that "If all the conditions sought by the North Western and the Milwaukee were to be imposed, the benefits derived by applicants from the proposed merger would be minimal."

Turning to the effect of the proposed merger upon railroad employees, the First Report found that "the merger would result in a net loss of 5,200 jobs on applicant railroads alone", plus the disruptive effects of "bumping" pursuant to seniority rights (App. 155), and concluded that the impact upon employees was a factor adverse to approval of the merger (App. 156). There was then no agreement between the Northern Lines and rail labor as to employee protective conditions.

In initially disapproving the proposed merger, the majority of the Commission stated in the First Report (App. 157-158) that

> The legislative history of section 5 clearly shows that the Congress did not adopt a policy fostering or encouraging railroad unifications. It was the Transportation Act of 1920, not the Transportation Act of 1940, that embodied a policy favoring railroad consolidations. That policy was expressed in the following language amending section 5 of the Interstate Commerce Act:
>
> > (4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems.
>
> The policy adopted by the Congress in 1920 failed because of the means employed to effectuate it. The examiner's belief that the Transportation Act of 1940 continued the policy of favoring railroad mergers is an error which permeates

the recommended report * * *.[2] [Footnote omitted.]

2. *Intervening events*

In July 1966, the applicant railroads filed with the Commission a petition for reconsideration stating, *inter alia*, that they would enter into agreements with Milwaukee and North Western to accept imposition of all protective conditions sought by those roads. In addition they stated that they had entered into agreement with the railroad labor unions providing attrition protection. They further alleged that savings resulting from the merger would be greater than indicated in the First Report. At this point, many parties who had opposed the merger as originally proposed filed pleadings indicating support for (or withdrawal of opposition to) the merger. Included in this group were the Railway Labor Executives' Association, the Secretary of Agriculture of the United States, the Milwaukee and North Western Railroads, the North Dakota Public Service Commission, the Public Utility Commissioner of Oregon, the South Dakota Utilities Commission, and the Province of British Columbia.

In January of 1967, the Commission reopened the proceeding for reconsideration and oral argument on all issues, and directed a further hearing limited to determining the amount of merger savings in light of (a) Milwaukee and North Western agreements as

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[2] The five dissenting Commissioners contended that this view of Section 5 was inconsistent with this Court's view as expressed in *County of Marin* v. *United States*, 356 U.S. 412, 417-418 (1957), discussed hereafter.

to the conditions and (b) other subsequent changes. These hearings, restricted to the most current information readily available, were held in early 1967. After the filing of briefs, the Commission held oral argument on June 13, 1967.

3. *The Second Report*

On November 30, 1967, the Commission issued a report sustaining the merger, by a vote of eight-to-two, and imposing all North Western and Milwaukee conditions, as well as "attrition" protection for labor (App. 245). The Commission extensively examined existing and post-merger rail competition in the merger territory generally and in the Northern Tier four-state area particularly (App. 312, 323), concluding, for reasons discussed *infra*, at pp. 46-83, that the termination of competition between the Northern Lines should not be the controlling factor. In so holding, the Commission found (App. 312) that the restrictive view of the 1940 Act expressed by the majority in the First Report had "contributed materially to the result there reached," noting that in the meantime this Court, in *B.&O. Ry. Co.* v. *United States*, 386 U.S. 372, 387 (1967), had reiterated its *County of Marin* conclusion that

> * * * the result of the 1940 Act was a change in the *means*, while the *end* remained the same. The very language of the amended "unification" expressed clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification. [Emphasis in original.]

In the First Report the majority of the Commission had concluded that the loss of GN-NP rail competition in the Northern Tier states of Minnesota, North Dakota, Montana, and Washington, coupled with the adverse effect on employees, was decisive. In the Second Report, the Commission examined those Northern Tier stations where competition would be eliminated (Class 1), or reduced (Class 2). The Commission found that competition would be eliminated at 47 Northern Tier communities (147 stations) which "do not produce any great volume of applicants' business" (App. 316-317). Specifically, these stations accounted for only 6.6, 5.6, and 6.2 percent, respectively, of Northern Lines' cars, tons, and revenues in the four-state area. As to some of these stations the Commission found that loss of rail competition was "more theoretical than real" (App. 317). The respective percentages attributable to those stations where railroad competition would continue, though reduced, were larger: 32.6, 27.8, and 37.7 percent of their cars, tons, and revenues. These stations, however, as the Commission found, included the principal Northern Tier terminals of Twin Cities, Portland, Seattle and Spokane where, following the merger there would continue to be substantial rail and intermodal competition (App. 317-318). Since the Commission found, contrary to the First Report, that it would be feasible to impose all the conditions requested by the Milwaukee to enhance its competitive position, the Commission took into account the factor that "the Milwaukee—which is the other railroad serving many of the class 2 points—will be

substantially strengthened as a meaningful transcontinental competitor" (App. 319). Finally the Commission found that apportionment of traffic between railroads serving competitive points often results from factors entirely apart from competition (App. 319).

With respect to merger benefits, all unchallenged on this appeal (except for the speculations of the Department discussed *infra*, at pp. 92-99), the Commission found that the proposed merger would produce some $39 million in annual savings—as against $25 million estimated in the First Report, and would enable the Northern Lines to render improved service and earn a return "* * * more nearly commensurate with the investment requirements of a viable and progressive transportation system" (App. 259, 304-305). This difference from the prior finding as to merger savings is in large part attributable to two factors. First, the Commission's First Report had made a downward adjustment of $5.2 million, or one-third, in the projected savings attributable to coordination and consolidation of facilities at common points—"based on the belief that certain coordinations between GN and NP would voluntarily be effected once it was established that the merger would not be permitted." Upon reconsideration in its Second Report, the Commission concluded that this downward adjustment was unwarranted (App. 300). Secondly, at the further hearing following the First Report, the estimated savings from the elimination of jobs were increased due to intervening increases in wages and employee benefits (App. 264-266, 300-305).

Shippers will have available the lines of the entire merged company, thereby receiving fast and more dependable single-line service with shorter through routes; improved car supply, ordering, and tracing; wider routing privileges; generally lower single-line rates; and less switching (App. 308-309). In addition numerous benefits will accrue through the various Milwaukee conditions discussed, and through conditions imposed for other railroads. In all, the Commission found that "this merger can lead to the creation of meaningful rail competition through strengthening of the Milwaukee and the NW, as well as making the combined applicants a more proficient transport agency" (App. 344).

The labor attrition conditions provide for total employment security, conferring upon employees "guarantees and job assurances for the rest of their working lives * * *"—protection which "could hardly have been achieved except for the merger" (App. 325, 326).

Finally, the Commission reserved jurisdiction for five years or such other period as may be prescribed to require inclusion of other lines and attach appropriate conditions upon request of any party in interest "necessitated by any cumulative or cross-over problems stemming from approval of this merger and any other transactions authorized under section 5" (App. 455-456, 479-480).[3]

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[3] The Commission had in mind primarily the proposed Milwaukee-North Western merger and consolidated Section 5 proceedings involving the Chicago, Rock Island and Pacific Railroad. In December of 1968, the hearing examiner in the

In two further reports, issued in April and June of 1968 (App. 463, 498), the Commission again stressed the strengthening of the Milwaukee, revising certain conditions so as to enhance the provision granting Milwaukee access to Portland, and making clear that the eleven Milwaukee "gateways" would be applicable to grain, thereby giving grain shippers a choice of carriers not previously available.

In its First Report disapproving the merger, the Commission had no occasion to consider the contentions of the appellant Northern Pacific Stockholders' Protective Committee as to the fairness of the merger stock exchange ratios as between the Great Northern and Northern Pacific stockholder groups. In approving the merger, the Commission considered the Committee's contentions, and found that the stock exchange ratios are just and reasonable in that "(1) * * * they are the results of arms' length bargaining, and (2) they fairly reflect the contribution of each group of stockholders to the combined system" (App. 286-297).

C. The Decision of the Three-Judge Court

In sustaining unanimously the Commission's order, the three-judge court reviewed meticulously every issue raised by the plaintiffs in that court. It concluded generally that "in giving its approval the Commission was guided by the applicable legal prin-

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Milwaukee-North Western case issued a report recommending conditional approval. The *Rock Island* hearings closed in August of 1968. Both proceedings are far from final Commission actions.

ciples and made findings, supported by substantial evidence, requisite to the validity of its findings" (App. 5). More specifically, it sustained the Second Report's interpretation of the national policy with respect to rail consolidation, and concluded that the Commission was not guided by a presumption in favor of mergers—as was then charged by the Department (App. 21).

The lower court gave "special attention to whether the competitive situation to result from the unification, conditioned as it will be, is inconsistent with the public interest, or, as we believe, is consistent therewith in light of the national transportation policy formulated by Congress" (App. 6). After detailed consideration of the Commission's analysis as to the rail competition which would be eliminated and that which would remain, including the enhanced competitive position of the Milwaukee, the court sustained it (App. 22-32). In addition, the court below sustained the Commission in taking into account the competition from other modes of transportation—in measuring the transport competition which would remain following the proposed merger (App. 34-38).

With respect to the benefits which the Commission found would result from the merger, the improved service aspect was not challenged. However, the court did consider and uphold the Commission's findings that the proposed merger would produce savings of about $40 million annually (App. 38-42).

The court below also "note[d] with approval" (App. 6) the Commission's reservation of jurisdic-

tion for "5 years or such other period as the Commission may, for good cause shown, hereafter prescribe", to require inclusion of other lines and impose such further conditions as may be necessitated by any cumulative or cross-over problems stemming from the instant merger and any other authorized consolidation in the involved territory (App. 50-51).

Turning to the stock exchange ratio, challenged by the holders of about 5% of Northern Pacific stock, the court below noted (App. 42-43) that

> Northern Pacific stockholders would receive common stock on a share for share basis. Great Northern stockholders would receive stock on a share for share basis plus one-half share of New Company's $10.00 par value 5½ per cent preferred stock for each share of Great Northern stock held at the date of the merger. The preferred stock is to be retired, through the operation of a mandatory sinking fund, over a 25 year period beginning at the fifth anniversary of the merger. Also, the preferred stock would be redeemable at the option of New Company after the fifth anniversary in a manner not separately opposed. [Footnote omitted.]

The court sustained the Commission's finding that the stock exchange ratio was "just and reasonable" within the meaning of Section 5(2)(b) in that it was the result of prolonged arms' length bargaining, reflected fairly the contribution of each group of stockholders to the combined system, and had been approved by overwhelming majorities of both Northern Pacific and Great Northern stockholders (App. 42-46). The lower court specifically concluded that stock

market price fluctuations in Northern Pacific and Great Northern common stocks, are "those normal fluctuations which can be expected to occur during the course of any protracted administrative proceeding and which have no effect upon the ultimate fairness of the Commission's finding" (App. 45-46).

Finally, the lower court found no merit in the contentions of the City of Auburn (App. 52-53) and the Livingston Anti-Merger Committee (App. 55-57).

SUMMARY OF ARGUMENT

These appeals from the unanimous decision of a three-judge court sustaining the decision of the Interstate Commerce Commission, in its Second Report, in approving the consolidation of the Northern Lines and their subsidiaries (including the Burlington and the SP&S) with major conditions, are unique in that the Commission's decision is not now challenged by any shippers, by competing carriers, by any of the States in which they operate, or by the unions representing their employees.

I.

A. The principal attack upon the Commission's order is by the Department of Justice, which contends that from the Transportation Act of 1920 through the Transportation Act of 1940 to date, the Congressional policy toward rail unification has been a concern for combining the weak lines with the strong, and that the consolidation of competing lines (absent a failing company situation) cannot be justified by

the benefits of improved service to shippers and substantial savings to the railroads involved.

Contrary to the Department's position the entire interpretation and application of the rail consolidation provisions of the Transportation Act of 1920 by the Commission and by this Court confirm that the Congressional objectives of economy and efficiency in the transportation system were to be achieved in large part by consolidating the Nation's railroads into a limited number of systems, with immunity from the antitrust laws for Commission-approved transactions, rather than in complete reliance upon rail competition enforced under the antitrust laws. This Congressional policy was confirmed by the Emergency Railroad Transportation Act of 1933, and was continued in the drastic revision of the rail consolidation provisions of the Interstate Commerce Act by the Transportation Act of 1940. As this Court has reiterated, "the result of the [Transportation Act of 1940] was a change in the *means*, while the *end* remained the same." *County of Marin* v. *United States*, 356 U.S. 412, 416-418 (1958); *B&O R. Co.* v. *United States*, 386 U.S. 372, 386-387, 459 (1967); *Penn-Central Merger Cases*, 389 U.S. 486, 499-500 (1968).

From *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) to the Seaboard-Coast Line merger litigation (*Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965) (reversing *per curiam*); *Florida East Coast Ry. Co.* v. *United States*, 386 U.S. 544 (1967)), this Court has emphasized that the Commission, in determining whether a proposed railroad consolidation is consistent with the public interest, is

not to be controlled by the specific criteria developed under the antitrust laws, but is to take into account the underlying policy of the antitrust laws by balancing any resulting diminution in competition against the benefits of improved service to shippers and savings and improved competitive posture for the railroads involved. *McLean Co.* v. *United States, supra.*

This Court's decision in *Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968), provides no support for the Department's view that, absent a failing company situation, improved service and savings must be found by competing railroads only in competition and not in consolidations which the Commission finds to be in the public interest. To the contrary, in recent years, the Congress has wholly refused to impose even a temporary moratorium upon railroad mergers producing such benefits.

B. In approving the proposed merger, the Commission appraised the resulting diminution of rail competition, the rail competition which would remain —including the competitive role of the Milwaukee as substantially enhanced by conditions attached by the Commission to its approval of the merger—the inherent limitations of competition between railroads, intermodal competition, and the benefits which the merger would produce both for the shipping public and the applicant railroads.

While the Northern Lines (GN and NP) are competitive to the extent found by the Commission, their major joint subsidiary, the Burlington, is complementary rather than competitive. Contrary to the suggestion of the Department, the Commission did

not measure the competitive effects of the merger only in terms of the area served by GN, NP, and Burlington, but also in terms of the elimination of competition betwen GN and NP in the Northern Tier states of Washington, Montana, North Dakota, and Minnesota. In the latter area, the Commission found that the merger would eliminate rail competition at only 47 communities currently served by NP and GN, and no other railroad. These stations accounted for only 6.16% of their Northern Tier revenues. Competition would continue—though reduced by one carrier—at points served by GN and NP and by one or more other railroads, which accounted for, at most, 37.71% of their revenues. Thus, in the four Northern Tier states, and exclusive of overhead traffic, GN and NP are not competitive with each other for 56.13% of their revenues. And even these percentages tend, as the lower court found, to overstate the true competitive situation. Substantial rail competition would continue at the Northern Lines' principal terminals of Twin Cities, Portland, Seattle, and Spokane. Union Pacific would continue to be a substantial competitor for traffic between the Northwest and the eastern half of the country. The Commission found that the conditions which it prescribed for the protection and enhancement of the Milwaukee's competitive position would enable that railroad to compete far more effectively than in the past in the area served by GN and NP.

The competitive consequences of a merger can also be measured in terms of particular classes of traffic. Recognizing that manufactured goods are

the most susceptible to diversion from rail to motor transport, the Department focuses its present concern on the alleged monopolistic effect of the proposed merger upon the rail transportation of bulk commodities—the products of agriculture, forests, and mines. The fact is that over 80% of the revenue derived by the Northern Lines on shipments of these products which they originate in the Northern Tier is from points where the competitive situation will not be affected by the proposed merger—because such points are served by only GN *or* NP, or by GN *or* NP *and* one or more railroads not involved in the merger. Throughout the Tier, the Northern Lines are subject to increasing competition by motor and water carriers (regulated and unregulated). And the Commission gave weight to the fact that the merger, as conditioned, had substantial support from shippers and groups in the Northern Tier.

Moreover, the Commission properly gave weight to the imperfect competition between railroads generally and GN and NP in particular. Railroads are excused from enforced price competition by the Reed-Bulwinkle Act (49 U.S.C. 5b). The force of regulation limits competition. As a practical matter rail competition is greatly limited by physical factors. Thus for a grain elevator served by the siding of one railroad, but not by that of another two miles away, the practical competitive situation differs from that of two drug stores on a street intersection. Similarly location of branch and main line service may render competition more theoretical than real. The Commission correctly concluded that in the large area where

the GN and NP lines are 100 miles apart, a shipper located on one "is not influenced by competition in the selection of carriers."

The Commission's approval of the proposed merger was subject to drastic conditions, *inter alia*, to protect and enhance the competitive position of the Milwaukee (more importantly) and the North Western. The Milwaukee conditions not only protect it from the competitive impact of a Northern Lines merger, but will put it in a stronger competitive position than it has ever enjoyed. The United States Department of Agriculture (and Milwaukee and many other parties) regarded this enhancement of Milwaukee as a competitor to be so valuable to shippers of agricultural commodities as to warrant withdrawal of opposition to the proposed merger.

The Commission found that the proposed merger would produce substantial service improvements and savings of about $39 million annually for the merger applicants. The service benefits, such as faster service over single-line routes, greater transit privileges, improved car supply, etc. are not challenged. While the Commission noted that "applicants have enjoyed a moderate degree of success", it concluded that the long-term decline in their earnings and their below average rate of return on investment meant that such substantial savings were a factor justifying approval of the merger. The Department's contention that absent merger other comparable savings can be achieved is without support in the record and is refuted by the history of such suggestions.

The competitive consequences of the proposed merger and its resulting benefits compel comparison with the corresponding facets of the Seaboard-Coast Line merger, in which the Commission's approval was finally sustained by this Court's *per curiam* affirmance in 386 U.S. 544 (1967). There, as here, the merger applicants were moderately healthy railroads. The elimination or reduction in rail competition resulting from the Seaboard-Coast Line merger was more extensive than would occur here. In both, the merger benefits which the Commission balanced against the competitive consequences were the same "conventional" service improvements and cost savings which the Department contends cannot justify the merger of competing railroads (absent a failing company situation). Moreover, the Seaboard-Coast Line merger involved no factor comparable to the enhancement of Milwaukee's competitive position as a condition to the Northern Lines merger.

II.

The Commission properly held that the merger stock exchange ratio was just and reasonable. In rejecting the contention of minority stockholders of NP that the terms did not reflect adequately the value of NP's natural resource assets, the Commission found that the terms were the result of arms' length bargaining between the two managements and fairly reflect the contributions of each group of stockholders to the combined system. The history of the lengthy negotiations, in which both sides retained independent financial advisors, shows that the value of the

natural resources was thoroughly considered. The more favorable terms for GN stockholders reflect that railroad's general superiority and strength through the years, while, at the same time allowing NP stockholders to ultimately participate in the new company on an equal basis.

Nothing in the appellant Committee's testimony established any unfairness as a matter of law. Indeed the Committee's views were rejected by NP stockholders themselves. The Commission properly rejected the notion that the NP natural resources should be segregated and offered for sale to those NP stockholders wishing to buy in. This proposal carried with it adverse tax consequences, great practical difficulties, and some degree of unfairness to present NP stockholders.

The Commission properly exercised its discretion in denying the appellant Committee's requests for further hearings. The Committee sought to show nothing beyond normal fluctuations which could be expected to occur during the period consumed in the processing and litigation of a rail merger. The effort to "update" the record would not have altered the validity of an exchange based on long-term performance.

III.

The appeals of the City of Auburn and the Livingston Anti-Merger Committee present no grounds for reversal.

ARGUMENT

I.

The Commission's Approval of the Merger Conforms to the Congressional Policy With Respect to Railroad Consolidation and Is Supported by Adequate Findings Based Upon Substantial Evidence.

A. *The Department's Attack upon the Criteria Employed by the Commission in Approving the Merger Is Wholly Inconsistent with the History and Purpose of the Rail Consolidation Provisions of the Interstate Commerce Act as Interpreted by this Court.*

The Department's present attack upon the Commission's order (and upon the unanimous decision of the court below) is essentially an attempt to reargue this Court's line of decisions running from *McLean Trucking Co.* v. *United States*, *supra*, to the *Penn-Central Merger Cases*, *supra*. In essence, the Department contends that the Commission may not approve a merger of competing railroads unless the merger is required to meet a "serious transportation need" or to secure "important public benefits"; and that the proposed Northern Lines merger cannot be justified by "the conventional results of any such combination of competitors—predicted savings to the parties and prospects for some operational efficiencies, * * *" (Br., pp. 20, 23). Absent such a need or benefits, the Department contends that "the presumption of the National Transportation Policy and of Section 5 is that the pressures of competition will better force achievement of the cost reductions, savings, and operational efficiencies which are claimed for mergers" (Br., pp. 65, 66).

The Department's new standard is drawn from a decision of the Federal Maritime Commission, approved by this Court in *F.M.C.* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968), that it would approve anticompetitive steamship conference rules only upon a demonstration that they were "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." But there is nothing in *Svenska, supra*, suggesting that the very merger benefits largely unquestioned here would not constitute "important public benefits" or meet a "serious transportation need." Indeed in the decision underlying *Svenska*, the F.M.C. had found that the conference rules had no benefits at all (10 F.M.C. 27, 44, 46). In any event, this Court's decision cannot be perverted into a holding that the Interstate Commerce Commission must scuttle the long-standing Congressional policy of restructuring the Nation's railroads to a limited number of systems. Indeed, in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 91-92, this Court, in setting aside a regulatory decision thought to be compelled by a general national policy favoring competition, warned

> That there is a national policy favoring competition cannot be maintained today without careful qualification. * * * It would most strikingly disregard areas where policy has shifted from one of prohibiting restraints on competition to one of providing relief from the rigors of competition, as has been true of railroads.

Recognizing that the standards which it would derive from *F.M.C.* v. *Svenska Amerika Linien, supra,* cannot override a specific Congressional policy with respect to railroad unification, the Department would characterize the consolidation provisions of the Transportation Acts of 1920 and 1940, as follows (Br., pp. 30-31):

> * * * It is clear from the legislative history that the primary goal was not the economies that might result from consolidation but correction of the financial problems resulting from the disparity of returns between weak and strong railroads. And the 1920 Act expressly directed that in the national consolidation plan "competition shall be preserved as fully as possible." [Footnote omitted.]

In other words, the Department would restrict the merger provisions of Section 5 to sick carrier situations, and lay down a rule of law that savings and operating improvements must flow from competition and not from unification. This is a novel and complete misreading of the history of the national policy with respect to rail unification.

The Transportation Act of 1920 directed the Commission to "prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems." 41 Stat. 481. The Commission was authorized to approve a proposed consolidation of two or more railroads upon finding that the transaction was "in harmony with and in furtherance of the complete plan of consolidation" and that "the public interest will be pro-

moted by the consolidation." *Id.* In the formulation of the plan, the Commission was admonished that "competition shall be preserved as fully as possible." The Act further provided that railroads involved in an approved consolidation be "relieved from the operation of the 'antitrust laws.' "

The impact of the 1920 Act upon the application of antitrust concepts to rail consolidations was illustrated by the Commission's early approval, in *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508 (1923) and *Control of D., S. & S. R.R. by Lehigh Valley R.R.*, 86 I.C.C. 567 (1924), of combinations which had earlier been found violative of the antitrust laws, in *United States* v. *Southern Pacific Co.*, 259 U.S. 214 (1922) and *United States* v. *Lehigh Valley R. Co.*, 254 U.S. 255 (1920).

It is perfectly true that in the enactment of the Transportation Act of 1920 and in the continuing consideration of railroad problems, there was much discussion of rail unification as a means of preserving the so-called weak railroads by combining them with the strong.

However, the 1920 Act as a whole embodied a concern for economy and efficiency in railroad operations. As this Court almost contemporaneously observed in *Texas & Pacific Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266, 277 (1926):

> * * * By [the Transportation Act of 1920], Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the finan-

> cial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. * * *

Specifically, as the 1920 Act was interpreted by both the Commission and this Court, it was recognized that economies and operating improvements could justify a unification of competing railroads. In fact, in approving rail unifications under the original 1920 Act, the Commission repeatedly gave weight to anticipated savings and operating improvements.[4] For example, in *Great Northern Pacific Ry. Co. Acquisition*, 162 I.C.C. 37 (1930), the Commission approved a unification of the Northern Lines, upon the condition, *inter alia*, that they divest themselves of control through stock ownership of the Burlington.[5] In so doing, the Commission stated that "Foremost among the considerations in favor of the proposed unification is the feasibility of making large operat-

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[4] Sharfman, *The Interstate Commerce Commission* (1935), Vol. III-A, pp. 453-456.

[5] This condition, based upon the fact that the Commission's Plan under the 1920 Act allocated the Burlington to another system, undoubtedly caused the Northern Lines not to consummate the transaction. In the present case, the inclusion of Burlington in the proposed merger is not challenged by the Department.

ing economies" (*id.* at 47). It should be noted that the proposed unification, which prior to the 1920 Act had been held to violate the antitrust laws in *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904), was approved at a time when intermodal competition was in its infancy.

As this Court stated in *N.Y. Central Securities Co.* v. *United States*, 287 U.S. 12 (1932): "The public interest is served by economy and efficiency in operation" (at 23). "The fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission" (at 25). "The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case" (at 26). And again, in *United States* v. *Lowden*, 308 U.S. 225, 232 (1939), it was recognized that with "the enactment of the Transportation Act of 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy * * *."

In the Emergency Railroad Transportation Act of 1933 (48 Stat. 211), enacted when the railroads were again in serious financial difficulties, the Congress made it clear that the achievement of operating economies was a major objective of its railroad policy. Some of the stated purposes of the coordination provisions of this Act were "(1) to encourage and promote or require action on the part of the carriers

* * * which (a) avoid unnecessary duplication of services and facilities of whatsoever nature and permit the joint use of terminals and trackage incident thereto or requisite to such joint use * * * (c) avoid other waste and preventable expense * * *" (48 Stat. at 212).[6] In *Texas* v. *United States*, 292 U.S. 522,

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[6] This significant emphasis in the 1933 Act is fully recognized in Leonard, *Railroad Consolidation under the Transportation Act 1920* (1946) (relied upon by the Department) where it is stated, at pp. 223-224, that

> Perhaps the most significant feature of the Act of 1933 was the emphasis placed upon consolidation. The creation of a Federal Coordinator of Transportation with authority to investigate and recommend action to prevent wasteful duplication in service indicated that the Administration and Congress wished to determine the usefulness of consolidation as a means of reducing costs and improving efficiency of service. It will be recalled that discussion leading up to the Act of 1920 minimized this aspect of consolidation, and stressed primarily the role of consolidation, along with recapture, in balancing returns among systems and preserving the life of weak lines. In 1933, the suggestion that returns be balanced could be regarded as frivolous. The real problem so far as most railroads were concerned, was to provide the basis for any return whatsoever. [Footnote omitted.]

And again at pp. 281-282

> * * * For one thing, the Transportation Act did not place enough emphasis upon the operating advantages of consolidation, that is, upon the economies and improvement in service which could be brought about through physical integration of properties. This aspect of consolidation, largely ignored throughout the 1920's, assumed widespread importance in the 1930's when the reduction in traffic volume and revenues made it necessary to cut operating costs drastically without impairing standards of service. The importance of economies resulting from consolidation was recognized in the Emergency Trans-

530 (1934), this Court recognized that the provisions of the 1933 Act "confirm and carry forward" the "new railroad policy" of the 1920 Act, and that "It is a primary aim of that policy to secure the avoidance of waste."

The Department apparently suggests that the consolidation provisions of the Transportation Act of 1940 either continued or created a policy under which a merger of competing railroads (absent a weak line situation) cannot be justified by the resulting savings and operating improvements. We have shown above that there was no such prior policy. Nor did one evolve in the Transportation Act of 1940. This Court has noted that in the 1940 Act Congress "essentially * * * adopted those [recommendations] of the Committee of Six." *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 319 (1954); *Schwabacher* v. *United States*, 334 U.S. 182, 193 (fn. 12) (1948); and see App. 313-314. The Commission was finally relieved of its duty to promulgate a national consolidation plan and the power to initiate mergers and consolidations was left completely in the hands of the carriers. The Committee of Six had recommended that "The present requirement in section 5 * * * of the Interstate Commerce Act for a consolidation plan should therefore be repealed, and other requirements of that section as to the showing necessary to justify

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portation Act of 1933, which established the Office of Federal Coordinator of Railroads and charged him with the duty of investigating and promoting coordination and consolidation so as to reduce excessive waste in the railroad system.

any proposed consolidation should be modified."[7] In support of its recommendation, the Committee of Six stated:[8]

> Historically, the large railroad systems of the United States have developed through the consolidation of numerous small roads. *Economies of operation* have thus been secured and a *more satisfactory transportation service* has been afforded to the public. It is our belief that *other economies* may be effected and that *added improvement* may be made in the service rendered the public through further consolidations, * * *
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> * * * *
>
> Competition between railroads is of continually lessening importance to the public as other modes of transportation supply more and more of that competition which was once provided only by competition between the railroads themselves. The result is that further railroad consolidations may be effected in many cases with great public benefit. Proper consolidations would also be a factor in the *elimination of circuitous routing*, with the direct result of increasing carrier earnings without increases in rates to the public. [Emphasis added.]

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[7] Report of the Committee appointed September 20, 1938, by the President of the United States to Submit Recommendations upon the General Transportation Situation, December 23, 1938. The report is printed in *Hearings, Committee on Interstate and Foreign Commerce*, House of Representatives, 76th Cong., 1st Sess. (1939) (H.R. 2531) pp. 259-308. The Committee, appointed by President Roosevelt, consisted of three rail executives and three representatives of railway labor.

[8] House Hearings, *supra*, at p. 275.

Thereafter, the 1940 Act amended the consolidation provisions of the Act to their present form by deleting the "plan" requirement. In so doing, it also deleted the provision of the 1920 Act that in the national consolidation plan required by that Act "competition shall be preserved as fully as possible" (41 Stat. 456, 481)—in which the Department would find some continuing significance (Br., p. 31). It is clear that the deletion of the "competition" requirement was not inadvertent, but was recognized as the elimination of an additional obstacle to consolidations which could produce substantial economies. House Hearings, *supra*, at pp. 275, 673-674.

We submit that the foregoing analysis of the interpretation and application of the consolidation provisions of the 1920 Act, the added emphasis of the 1933 Act upon economies and efficiencies, and the real objective of the 1940 revision, clearly shows that there is no basis for the Department's present view that from 1920 to date Congress has intended that the merger of competing railroads (other than weak or failing lines) cannot be justified by the resulting savings and operating and service improvements.

All of the Department's basic contentions were rejected by this Court in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) and subsequent decisions. The *McLean* transaction—merger of seven eastern motor carriers into the largest single motor carrier in the United States—was opposed by the Department before the Commission and the lower court. In this Court the Solicitor General took no position, but the essence of the Department's argument was

presented in a brief filed for the Secretary of Agriculture. In language resembling that of the Department's here, the Secretary argued in *McLean* that:[9]

> The Act does not permit the merger of strongly competing motor carriers into a vast system if adequate transportation can be maintained or achieved without such merger.
>
> * * * *
>
> But it is submitted that a merger otherwise illegal under the antitrust laws should not be authorized unless it is necessary to provide adequate service for the public. Lesser matters of mere convenience (such as improved equipment or increased economy in operation) are not sufficient to warrant departure from the settled policies of the law.

In rejecting arguments against the *McLean* merger this Court started with the obvious proposition that the provision of Section 5(11), excepting carrier unifications approved by the Commission from the antitrust laws, can only mean that the lawfulness of such carrier consolidations is not to be measured by the criteria of the antitrust laws applicable to industry generally. We set forth for convenient reference this Court's analysis in *McLean Trucking Co. v. United States, supra:*

> The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of § 5(11), that the policies of the anti-trust laws determine

[9] Brief for Secretary of Agriculture of the United States, No. 31, O.T. 1943, pp. 38, 40.

"the public interest" in railroad regulation only in a qualified way. And the altered emphasis in railroad legislation on achieving an adequate, efficient and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business, cf. *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, has its counterpart in motor carrier policy. * * * [321 U.S. at 83]

* * * *

* * * there can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by "encouraging the organization of strong units" in the motor carrier industry. And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility. * * * [Footnotes omitted.] [*Id.* at 84-85.]

* * * *

Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on the proposed merger to ignore their policy. * * * Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense relieves the

> Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy. [*Id.* at 86-87.]
>
> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. * * * [*Id.* at 87.]

Particularly pertinent to the present case is this Court's conclusion that in determining whether a carrier merger is consistent with the public interest, the Commission may balance the very benefits of operating and service improvements and lower costs, which the Department deprecates as "conventional," against "the resulting curtailment of competition."

The subsequent decisions of this Court reaffirm the basic principles of *McLean Trucking*. Thus, in *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173 (1959), this Court sustained the Commission's order authorizing Santa Fe and Pennsylvania to acquire joint control through stock ownership of the strategic Toledo, Peoria & Western Ry. Co. In so doing, this Court reiterated at 361 U.S. 187-188 that

> Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it

finds they are in the public interest, "because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by 'encouraging the organization of stronger units' in the industry. *And in authorizing those* [*acquisitions*] *it did not import the general policies of the antitrust laws as a measure of their permissibility.* It in terms relieved participants in appropriate [acquisitions] from the requirements of those laws. § 5(11)." 321 U.S., at 85. It must be presumed that, in enacting this legislation, Congress took account of the fact that railroads are subject to strict regulation and supervision. "Against this background no other inference is possible but that, as a factor in determining the propriety of [railroad acquisitions] the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy." 321 U.S. at 85-86. [Emphasis added.]

County of Marin v. *United States*, 356 U.S. 412 (1958) is the first of three cases in which this Court has characterized the Congressional policy with respect to railroad unification before and after the 1940 amendment of Section 5. There this Court stated (at 416-418)

> The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system. In the Transportation Act of 1920 the Congress had directed the

> Commission itself to take the initiative in developing a plan "for the consolidation of the railway properties of the continental United States into a limited number of systems," 41 Stat. 481, but after 20 years of trial the approach appeared inadequate. * * * In short, the result of the Act was a change in the *means*, while the *end* remained the same. The very language of the amended "unification section" expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification. * * * [Footnotes omitted.]

This conclusion was twice affirmed by this Court in the prolonged litigation over the Commission's order approving the merger of the Pennsylvania and New York Central Railroad Companies, *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475 (1966). In the first of these cases, *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372 (1967), this Court, without reaching the merits of the merger order, enjoined consummation of the merger until the Commission had determined upon the inclusion of Erie-Lackawanna, Delaware & Hudson, and Boston & Maine in a larger rail system. Significantly, both the majority and dissenting opinions explicitly recognized the continuing Congressional objective of restructuring the American railroads into a "limited number of systems." Thus, the majority opinion states that (386 U.S. at 386-387):

> This pattern [of the 1920 Act] was carried forward in the Transportation Act of 1940, 54 Stat. 898; however, § 5 of the former Act was amend-

> ed to authorize the Commission to approve carrier-initiated proposals which it found to be consistent with the public interest and upon just and reasonable conditions. Under § 5(2)(d) additional power was given the Commission to condition its approval of a merger upon the inclusion, upon request, of other railroads operating in the territory involved. As we said in *County of Marin* v. *United States*, 356 U.S. 412 (1958), "The result of the [1940] Act was a change in the *means*, while the *end* remained the same. The very language of the amended 'unification section' expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *Id.*, at 417-418. The Commission has, therefore, not proceeded by or under "a master plan" for consolidation in the various regions. * * *

Similarly, the dissenting opinion of Justices Fortas, Harlan, Stewart, and White states that (p. 459):

> For more than 45 years it has been the national policy, reflected in Congressional legislation, that the railroads of this country should be combined into a limited number of systems. * * * Under the [Transportation] Act [of 1940], and in all of the years since 1919 or 1920, the national policy of effecting consolidations of the railroads into a limited number of systems has been unchanged.

Following further proceedings before the Commission and the fashioning of interim and permanent relief for the three adversely affected railroads, this Court, Mr. Justice Douglas dissenting, in the *Penn-*

Central Merger Cases, sustained the Commission's merger order on its merits. In so doing, the Court enunciated principles and conclusions which are applicable in the instant case (389 U.S. 498-501):

> With respect to the merits of the merger, however, our task is limited. We do not inquire whether the merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute. The judicial task is to determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substantial evidence. * * *
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> It is, of course, true that the policy of Congress, set forth in the Transportation Act, to consolidate the railroads of this Nation into a "limited number of systems" is a variation from our traditional national policy, reflected in the antitrust laws, of insisting upon the primacy of competition as the touchstone of economic regulation. Competition is merely one consideration here. See *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965). * * *
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>
> The Commission carefully considered the implications of the fact that the Pennsylvania and the New York Central, as individual systems, have operated at a profit, and that there are reasonably good prospects for a continuation of such operation. But it was impressed by the fact

> that, as individual systems, these profits are not sufficient to put the roads in a position to make improvements important to the national interest.
> * * *

Several principles emerge from this remarkably consistent body of this Court's decisions. From 1920 until today, it has been and is the national policy to restructure the Nation's railroads into a "limited number of systems." Even where consolidation of parallel lines will result in a reduction in competition or even in local rail monopolies, the Commission may find that these competitive consequences are, in the overall public interest, outbalanced by savings resulting from the elimination of duplicating facilities, by the railroads' long-range needs for greater earnings, by improved service to the shipping public, or by the opportunity which a particular consolidation may provide for preserving or strengthening other railroads in the territory involved.

The Department's present position was again articulated, in substance, in the *Seaboard-Coast Line* merger litigation. *Florida East Coast Ry. Co.* v. *United States*, 242 F. Supp. 14 (M.D. Fla. 1965); reversed *per curiam, sub nom. Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965); 259 F. Supp. 993 (1966), aff'd *per curiam*, 386 U.S. 544 (1967). In reversing *per curiam* the first decision of the three-judge court in that litigation, this Court reiterated the principle enunciated in *McLean Trucking Co., supra*, and *Minneapolis & St. L. R. Co., supra*, quoting as follows:

> "* * * The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.' * * *." [Brackets in original.]

As this Court there concluded (382 U.S. at 156):

> * * * It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be "consistent with the public interest." * * *

In the second proceeding before the three-judge court, the Department contended in its supplemental brief (at p. 19) that "when competing railroads are healthy and prosperous, a merger cannot be justified by pointing to the dollar savings resulting from the elimination of the duplicate facilities and manpower needed to sustain that competition." In its second opinion in the *Seaboard-Coast Line* litigation, the three-judge court characterized the Department's position as follows (259 F. Supp. at 1012):

> [Department of Justice] counsel explained * * * that the government's position really was that where two healthy competitors are involved economies or "dollar savings and other alleged benefits, transportation, service, and such other things" should *never* be enough to overcome se-

> vere "elimination of competition", such as here involved. [Emphasis in original.]

The three-judge court held that "this argument cannot, as a matter of law, be used to rewrite the statute" (*id.* at p. 1013). Moreover, in a detailed comparison of the Commission's findings in *McLean Trucking Co.* with its findings in *Seaboard-Coast Line* (259 F. Supp. at 1008-1009), the three-judge court noted that in each case the Commission had relied upon essentially the same benefits of improved service and operating efficiency and savings to the applicants. In both cases, there was lacking any "serious transportation need" or "important public benefits" other than the "conventional" merger benefits.

It is clear that the Department's new reading of Section 5 is wholly inconsistent with the recent understanding of the Congress. Thus, in the evolution of the Transportation Act of 1958 (72 Stat. 568) (in which, Congress, again troubled by the financial condition of the railroads, authorized the Commission to guarantee loans to railroads in an amount up to $500 million) the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, in a report adopted by the full Committee stated that

> The railroad industry has not, in the subcommittee's opinion, been sufficiently interested in self-help in such matters as consolidations and merger of railroads; * * * (Sen. Rept. 1647, 85th Cong., 2d Sess. (1958), p. 11.)

The minimum implication of the foregoing statement is that railroads may, as a matter of law, be permitted to improve their competitive and financial position by merger, though they are not "failing companies" in the antitrust sense.

As we have pointed out, the Department's present position is simply a restatement of its view, urged unsuccessfully in *McLean Trucking Co.* and *Seaboard-Coast Line* litigations, that there is no special national policy with respect to railroad restructuring under which a merger of competing railroads can be justified by the "conventional" benefits of savings and service improvements. That contention might be addressed appropriately to the Congress. Indeed, it has been without success. In 1962, the Senate Judiciary Sub-committee on Antitrust and Monopoly conducted hearings on a bill favored by the Department which would impose a moratorium on the Commission's approval of large railroad mergers which would otherwise violate Section 7 of the Clayton Act. See Hearings on S. 3097, 87th Cong., 2d Sess. The then-pending Northern Lines merger proposal (and others) were discussed at length. (*Id.*, *e.g.*, pp. 510, 521, 524, 600). The bill was not reported out of committee, thereby confirming this Court's consistent reading of the special national policy.

As we will show hereafter in detail, the Commission, in approving the proposed merger as consistent with the public interest, considered the resulting diminution in competition—with the competition, intramodal and intermodal which would remain—and balanced against the competitive situation the bene-

fits to the shipping public, and to the applicants. In so doing, the Commission fully complied with the principles enunciated in *McLean Trucking Co., supra,* and reiterated in every subsequent decision of this Court dealing with railroad consolidation.

B. *The Commission's Conclusion that the Merger, as Conditioned, Would Be Consistent with the Public Interest Is Supported by its Findings, Measuring the Competitive Consequences and Balancing Them Against the Resulting Benefits.*

1. *The Commission Realistically Appraised the Competitive Consequences of the Merger in the Northern Tier States.*

a. Elimination of Rail Competition

There are only 47 communities in the entire Northern Tier where GN and NP compete solely with each other, and where rail competition would thus be entirely eliminated by this merger. This amounts to only 4.25% of the merging lines' Northern Tier stations, and, as the Commission found, these points "do not produce any great volume" of Northern Lines' business" (App. 317). These communities at most accounted for only 6.6%, 5.6%, and 6.16% of Northern Tier cars, tons, and revenues attributable to GN-NP operations in 1960 (Exh. 16; App. 316).

The total population of these points where the new company would have a rail monopoly is approximately 250,000 (Exh. 15, pp. 24-36, 42-53, 63-74, 81-99). But even this figure includes Billings, where, as we show *infra,* pp. 61-62, the roads are complementary and not competitive, and where, under the merger

conditions, the Milwaukee will become a new competitor. After deducting the Billings population, this amounts to approximately 197,000 people, or about .03% of the total 1960 population of Minnesota, North Dakota, Montana, and Washington—where the competitive impact of the merger is claimed to be so serious as to require its rejection. This number is far less than those left with but one railroad after the Seaboard-Coast Line merger—15% of the people in a relevant six-state area; the City of Tampa, with a population of over 270,000; and 17 other communities averaging 6,500 people each. (320 I.C.C. at 164).

Even at some of the points where "monopoly" will result from the instant merger, the loss of competition will be, as the Commission found, "more theoretical than real" (App. 317). This consideration applies with particular significance to some of the larger points such as Helena, Montana; Grand Forks, North Dakota; and Pasco, Washington, where, as we show *infra*, pp. 62-63, competition between the roads is severely limited, or even rendered non-existent, by physical factors.[10]

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[10] Of 27 Minnesota communities where monopoly will result, 6 are so small as to have no recorded population, while another 7 are populated by less than 1,000 persons each (Exh. 15, pp. 24-36). At some of the remaining points such as Wadena, Morris, Sauk Centre and Moorhead, competition is limited by the fact that the lines may be complementary, or by location on main, branch, or principal transcontinental routes of one of the roads (Exhs. 1, 3; Tr. 500).

b. Reduction in Rail Competition

The Commission concluded that the impact of the merger upon stations where rail competition would continue, albeit with a lesser number of roads (Class 2), was not so significant as to warrant rejection of the transaction (App. 318-319). Included in this category are the major terminals of Duluth-Superior, Twin Cities, Seattle, Portland, and Spokane, each of which will be served by three or more competing roads after the merger. Generally, competitive service will be furnished to these and other Class 2 points by the merged company, and by the Milwaukee—as strengthened through the conditions imposed here—or by the Union Pacific, or by all three (as with Seattle, Portland, and Spokane). Roads such as North Western and the Soo Line will also serve some Class 2 points.

Several choices of rail routes, including some new ones, will be available to transcontinental shippers concerned with major terminals. This will be so even though the number of competing roads will be reduced by one. Traffic between Seattle and the Twin Cities can be routed directly, in single-line service, over the Milwaukee, thereby bypassing the Northern Lines entirely. Moreover, the Milwaukee, with "shorter routes and superior grades" (App. 321), will be substantially strengthened by conditions imposed here (*infra*, pp. 83-87). One such condition will enable the Milwaukee to reach Portland and thereby to participate in transcontinental traffic moving between California and the East. Another gives the Milwaukee a competitive north-south route along the coast.

The Commission also required the Northern Lines to open 11 Northern Tier areas to Milwaukee (three in Washington, six in Montana, and two in North Dakota), so that trancontinental shippers will be able to turn over shipments to the Milwaukee at any of these points, thereby holding a competitive weapon against the new company.

Union Pacific, operating a transcontinental route to and from the Pacific Northwest, is another significant competitor. Even under the Department's statistics, that carrier was shown to have transported some 26.9% of the east-west traffic (App. 146).[11] UP, operating with over 1,800 employees and a $23 million plant in Portland (Tr. 5535-5536), serves such Northern Lines' terminals as Portland, Tacoma, Seattle, and Spokane, and, through connections with other roads, shipments can and will be routed via UP for Chicago or Twin Cities. Additionally, shipments

[11] The Department asserts that the merged company would carry 83% and 61% respectively of the east and westbound traffic between the Northwest and the Twin Cities (Br., pp. 38, 42-43). A similar statement, not referring to the Twin Cities, appeared in the First Report (App. 147). The alleged 83% is erroneous; even the evidence relied upon by the Department would place the eastbound figure at 61% (Exh. 99, p. 12). But the evidence was merely a count of railroad cars passing through four points, and did not distinguish between competitive and non-competitive traffic. Nor did the exhibit reflect traffic between any particular points, since the origin and destination of the cars does not appear. Moreover, the figures do not reflect the impact of the Milwaukee conditions which, under any view, should increase that carrier's share; nor do they account for increased shares of Milwaukee and UP which will result from shippers who divide up traffic between roads serving a point (App. 25, 319).

can move between the Twin Cities and the Puget Sound area by use of the Canadian Pacific-Soo Line route. The Soo Line considers itself an east-west competitor (Tr. 10261-10264), maintains a traffic solicitation force at Seattle, and—with Canadian Pacific—operates between Spokane and the Twin Cities over a route not substantially longer than that taken by NP between the same points (*Railroad Atlas of the United States*, Rand McNally (1967) pp. 4-5).

In addition the routes of the Western Pacific (WP) and Southern Pacific (SP), through connections, compete with the Northern Lines, Milwaukee, and Soo Line-Canadian Pacific. WP, which connects with GN in northern California, operates a segment of the central corridor transcontinental route, and also connects with the Santa Fe—which serves Kansas City and Chicago, as well as points in southern California and the Southwest. UP's competitive posture is apparent from the fact that it here sought and obtained certain protective conditions (App. 331-333, 441-442) and unsuccessfully sought conditions which would have limited Milwaukee's ability to compete with the central corridor route (App. 480-491). SP, which serves Portland directly, forms part of a transcontinental route, and also competes for Pacific Northwest traffic.

After merger, Portland, Seattle, Spokane, and the Twin Cities would be served by 4, 3, 4, and 9 roads, respectively, including the strengthened Milwaukee. Southern California, with nearly 10 million people, is served by only three transcontinental roads. The San Francisco Bay area, with nearly 5 million people,

is also served by three transcontinental carriers. After merger, the Puget Sound area—with a population ¼ that of southern California, and ½ that of the San Francisco Bay region—will be served by at least four transcontinental roads (the Canadian Lines, the Northern Lines, Milwaukee, and UP). Portland, the least populous area on the Coast, will have the services of four transcontinental roads (Northern Lines, Milwaukee, UP and SP) (Exh. 14, p. 4; Tr. 488-489). Oregon and Washington, though they originated and terminated fewer carloads than California, will have proportionally even more transcontinental rail service (Tr. 490).

In addition, the Commission observed that Class 2 stations, and particularly the large terminals, are also served by other modes of transportation competing for traffic (App. 319). The significance of intermodal competition in the Northern Tier is shown *infra*, at pp. 66-76. For present purposes, however, we note that Duluth-Superior, Seattle, Spokane, and the Twin Cities are served by 18, 35, 15, and 78 trucking companies respectively (App. 318) in addition to the various railroads. Seattle, Tacoma, Spokane, and the Twin Cities are served by coast-to-coast trucking companies (Exh. 17, pp. 28, 29). Fargo, North Dakota, a Class 2 station, has many motor carriers and receives as much as 50% of its less-than-carload "merchandise" by truck (Tr. 11660). Lastly there was substantial support for the merger from shippers and groups representing many of the Class 2 points (see *infra*, pp. 77-83)—a factor to which the Commission gave "considerable weight" (App. 320).

Numerically, the Class 2 stations are comparatively few—constituting only 7.47% of the Northern Lines' stations in the four-state area (App. 316). Because major terminals are involved, however, their respective shares of the merging lines' traffic is, of course, greater—amounting, at most, to 27.81% and 37.71% of the companies' Northern Tier tons and revenues (App. 316). But, as the lower court correctly noted, even these statistics "tend to overemphasize the importance of intramodal competition at these points" (App. 24), where the Commission had found that traffic was often apportioned to a particular railroad through factors entirely apart from competition (App. 319).

Thus, as noted below (App. 24-25), the revenue figures included all traffic received at competitive terminals although the origin may have been wholly non-competitive, a consideration particularly significant here since major terminals were among the points measured. For example, revenue on a shipment from Bismarck, North Dakota, to the Twin Cities was included in the Twin Cities statistics even though GN does not serve Bismarck, and GN-NP "competition" thus had nothing to do with originating the particular shipment. Similarly, as the lower court noted (App. 25), the tonnage figures are "misleading" because shipments moving on the same line were counted twice—once at origin and again at destination (Tr. 3197-3199, 3217-3218). For these reasons, claims that elimination or reduction of Northern Tier competition amount to 34% and 43% of the merging lines' tons and revenue in the four

states (Br., pp. 7, 38, 42)—computed by combining Class 1 and 2 statistics embodying these defects—should properly be considered only in the context of the above qualifications.[12]

c. No Loss of Competition

Stations now served solely by one merging line (Class 3) or by one merging line and some other road or roads (Class 4) are those where there will be neither loss nor reduction of competition. Each such station will have the service of the same number of roads as before the merger. These stations constitute 88.28% of the Northern Lines' points in the four-state area (App. 317)—by far the vast majority. In terms of traffic (measured even by the statistics with the defects noted above), the Commission found that these stations, which would suffer no adverse competitive impact from the merger, accounted for 60.73%, 66.59%, and 56.13% respectively of Northern Tier cars, tons, and revenues

[12] The Department, relying upon the First Report, also contends that competition between the merging roads for overhead traffic can be somehow attributed to 12% of their revenues (Br., pp. 7, 38, 42-43). As we understand the First Report and the record, however, the statistic dealt with only gross overhead traffic and did not distinguish between competitive and non-competitive traffic (App. 145; see Tr. 503). Moreover these shipments begin and end on the lines of other roads and merely move through the Northern Tier on their way to somewhere else; hence, the benefit of this alleged competition to the four-state area is purely speculative. In addition these overhead movements constitute the very transcontinental or north-south traffic for which other roads—such as Milwaukee, SP, UP, WP, and Soo Line-CP—will compete.

(App. 317). Hence under any statistical measure, the majority of Northern Lines' traffic in the four states is plainly not competitive between them. And as we have shown, and the lower court ruled, even these figures exaggerate the alleged anticompetitive consequences.

d. Limited Competition Between GN and NP for Transportation of Agricultural, Mining and Forest Products of the Northern Tier.

In arguing for rejection of this merger upon competitive grounds, the Department repeatedly emphasizes the importance of long-haul, bulk traffic of the Northern Tier, and particularly its agricultural, mineral, and forest products (Br., pp. 7, 10, 17-18, 38, 46, 47, fn. 37). But the plain fact is that this merger will have no adverse competitive impact upon most of the agricultural, mining, and forest traffic originated by GN and NP in the Northern Tier states of Minnesota, North Dakota, Montana, and Washington. This traffic, accounting for $174.1 million of the $230 million in business originated by the carriers in the four-state area in 1960, involves bulk commodities—less susceptible to intermodal competition, and crucial to the people and economy of the Northern Tier, as well as to the roads. Yet over 80% of the revenue earned by GN and NP in originating these vital commodities in Minnesota, North Dakota, Montana, and Washington comes from origins where GN and NP do not compete with each other—points served solely by one merging line or by a merging line and one or more other roads (Exh. 16, pp. 22-37).

Broken down by commodities, the evidence shows that as to originated traffic, GN and NP earned 89.44% of their Northern Tier agricultural products revenue, 89.61% of their Northern Tier mining products revenue, and 74.73% of their forest products revenue from points *where they do not compete with each other. (Id.)* Expressed in dollars, about $149.7 million of the total $174.1 million earned by GN and NP in originating Northern Tier agricultural, mining, and forest traffic came from origins where the two roads do not compete with each other.

These statistics are especially significant because they deal with traffic originated, as distinct from traffic terminated. Competition between GN and NP can most meaningfully be measured in terms of origins, for it is at the starting point that a shipper's choice of rail carriers has the most significance. And the Department virtually so concedes by its emphasis on the agricultural, mining, and forest products of the Tier. The Northern Lines, serving the large producing areas of the West, are essentially "originating" as distinct from "terminating" roads.[13] As the Commission noted (App. 253), the people and economy of the Northern Tier depend upon the rails for movement of the critical agricultural, animal, mining, and forest products from the western producing areas to consuming areas. Yet, as we have shown,

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[13] See generally *Boston and Maine Railroad* v. *United States,* 358 U.S. 68, 69 (1958) and *Boston and Maine Railroad* v. *United States,* 162 F. Supp. 289, 294 (D. Mass., 1958).

competition has only a limited significance for these commodities produced in the Northern Tier.[14]

e. Limits of Rail Competition

(i) General Considerations

Rail competition, though unquestionably important, is severely limited, stringently regulated, and imperfect at best. There are few railroads to begin with. This makes for a kind of oligopoly wholly distinct from the ordinary commercial market with many competitors seeking business. Because railroads are limited by their own fixed plants, they have little independent competitive flexibility. Every road, though "monopolizing" its own immediate area, can go only where its tracks go. Each road must interchange and reach agreements with many

[14] While percentages of competitive "terminating" traffic may be more impressive from the Department's viewpoint, such statistics are not so significant in the circumstances of this case. There is less terminating traffic (Tr. 484); hence any percentages involve a smaller universe. Second, "terminating" statistics fail to exclude shipments stemming from non-competitive origins. This is especially significant since major terminals (such as Twin Cities and Seattle) are located in Northern Lines' territory. Moreover, a large portion of the Northern Lines' terminating traffic consists of manufactured articles, more attractive to, and susceptible of diversion by other modes (App. 253; Tr. 440, 474). Traffic "originating" in Northern Tier manufactured articles is more competitive between the roads. But this traffic produced much less revenue than agricultural, mining, and forest products and is more vulnerable to motor carrier competition. GN-NP competition for "manufactured" goods originating in the Tier is thus not as significant as that for the agricultural, mining, and forest products.

others. The industry is characterized not by many independent competing units, but by a high degree of cooperation and agreement among the few.

The force of regulation acts as a strong restriction upon the ordinary sort of competition. Railroads cannot generally enter new markets or leave older unprofitable markets without Commission approval. A railroad must agree—or be forced to agree—with other railroads as to joint rates, through routes, division of proceeds jointly earned, and interchange of equipment. One railroad is not free to make its own decisions as to such matters, nor indeed to refuse to do business with another road. When emergencies exist, railroads may find substantial portions of their car fleet directed by the Commission to other roads in areas of the country. Railroads, unlike other industries, have a most limited freedom over a vital ingredient of competition—their "prices." Any significant rate change, up or down, is subject to the closest scrutiny of the Commission and the courts. Under an elaborate regulatory scheme, the Commission may set minimums or maximums; may suspend rates; may order rates cancelled; may prevent preference, prejudice, and discrimination in the rate structure; and may broadly substitute its own judgment for that of the company as to what the "prices" should be. Additionally, because of large fixed costs, the railroads have only a limited opportunity to engage in competitive pricing.

Rail rates are generally made not by one road deciding what it wants to do, but by "committees" or "bureaus" made up of many roads, including the

very competitors involved. These bureaus, authorized by law (49 U.S.C. 5b) as necessary to the transportation industry, amount nonetheless to a kind of lawful "price-fixing." Though the statute and the bureau agreements provide for a right of "independent action," the decisions are, to a great extent, collective and agreed upon. The bureau mechanism generally removes elements of surprise or quickness in pricing; everyone knows everyone else's moves. Proposals are adopted after time-consuming study, conferences, and votes by committees made up of the competitors themselves. Collective rate increases, or decreases, designed to meet intermodal competition, usually inure to benefit all roads party to the agreement. The railroad's decision as to its own prices is thus, unlike other industries, considerably removed from management. See generally Meyer, Peck, Stenason and Zwick, *The Economics of Competition in the Transportation Industries*, (1964) pp. 208- 211.

The Northern Lines, like the rest of the industry, make their rates through various bureau agreements. (Tr. 11648-11653; 14707-14709; Exh. 231, p. 11). See *Western Traffic Association—Agreement*, 276 I.C.C. 183 (1949); *Railroad Interterritorial Agreement*, 287 I.C.C. 701 (1953). As explained by a Minnesota traffic manager, when pressed by the Department of Justice for specific testimony as to the advantages of rail competition, "well I don't have any specific examples. Most of our requests go before the W.T.L. Committee and the member lines work on them as a team * * *" (Tr. 9819). Perhaps for this reason, comparable rates offered to the public by

GN and NP are not significantly different. As expressed by the Traffic Manager of the St. Regis Paper Company, with substantial Northern Tier operations, in selecting between GN and NP, "Your rates are usually the same." (Tr. 5757). For example, a study of shipments of wood chips (a raw material for paper manufacture), between various points in Oregon, Washington, and Idaho shows that the rates are generally the same whether GN or NP is selected as connecting carrier (Exhs. 78, 79, Section B, pp. 6-12). Respective rates on several important commodities at GN and NP common points are precisely the same. See, for example, rates on forest products moving from Seattle, Washington, to Breckenridge, Minnesota; forest products from Spokane to Duluth; crude arsenic from Anaconda, Montana, to Breckenridge, Minnesota, via either GN or NP as connecting carrier; manganese ore from Butte, Montana, to Allouez, Wisconsin; apples from Chehalis, Washington, to Breckenridge, Minnesota; threshed wheat from Billings, Montana, to the Twin Cities; celery, tomatoes, and cabbage from Portland, Oregon, to Seattle, Washington; and livestock from Butte, Montana, to St. Paul.[15]

(ii) Physical Limitations

In theory, a shipper located at a point commonly served between GN and NP has a choice of these two

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[15] TCFB Lumber Tariff 28-Q, I.C.C. 1750; TCFB 2-H, I.C.C. 1790; TCFB 6-E, I.C.C. 1783; TCFB 443-E, I.C.C. 1783; TCFB Fruit & Vegetables Tariff 44-P, I.C.C. 1744; TCFB Grain Tariff 45-M, I.C.C. 1792; NPCFB 23-N, I.C.C. 1033; NP Tariff, I.C.C. 10043; GN Tariff A-9251. These rates were in effect on June 20, 1969.

competing carriers. In fact this is not always so. Where, as here, preservation of rail competition is said to compel rejection of a merger, the Commission's recognition that rail competition is often, "more theoretical than real" (App. 317) is critical.

Competition between railroads is sharply limited by physical factors. Two roads, though "competing," generally operate within the confines of their own fixed plant. As Mr. Justice Holmes wrote, dissenting in *Northern Securities Co.* v. *United States*, 193 U.S., at 406 "A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed every railroad monopolizes, in a popular sense, the trade of some area." Thus, as the Commission found, the two lines—at many Northern Tier points—are simply "not competitive with each other" because the roads, though parallel, are widely separated, sometimes by as much as 100 miles (App. 316).[16] A glance at the map (Brief of Great Northern et al., Appendix A) demonstrates the validity of this finding. The lines converge in Minnesota and Washington but are far apart in North Dakota and Montana, which contain roughly half the Northern Tier trackage of the two roads (Exh. 13). It is one thing to argue that the two roads "compete" in North Dakota and Montana; but such competition is of little significance to shippers or receivers located at such North Dakota cities as Bismarck (population 27,-

[16] Indeed the examiner found that the major portions of the GN and NP main lines "are separated by hundreds of miles" (App. 770).

670) and Minot (population 30,604) or Montana points such as Bozeman (population 13,361) or Missoula (population 27,090)—each of which is located on one Northern Line, but at considerable distance from the other. Clearly, as the Commission found (App. 316), the presence of competition is of little meaning to shippers or receivers located at or near one road but 50 or 100 miles from the other. For these people, there is no meaningful choice between GN and NP; there is really only one road for them.

Competition is further limited by the fact that in certain instances the lines, while serving the same point, are complementary, rather than competitive. Similarly, a community, though purportedly served by "competitive" roads, may be located on the main line of one, but the branch line of the other. As explained by NP's vice-president for traffic, a witness with 23 years' experience in traffic work, "Main-line services of one railroad, because of its superiority over branch-line service of another, will be selected by a shipper unless time in transit is not important" (Tr. 500). These considerations are especially significant in analyzing the alleged competitive loss at certain larger points involved in this merger.

Thus Billings, Montana (population 52,851) is currently served by GN, NP, and CB&Q; but the three lines all enter and leave the city in different directions (Exhs. 1, 3). Billings is on the main east-west transcontinental route of NP, but on a north-south branch of GN. Shipments moving between Billings and the Puget Sound area, for example, would normally be carried over the NP main line because

shipment over the GN route would require 300 extra miles through Montana (*Railroad Atlas, supra*, pp. 4, 32). The fact that the CB&Q serves Billings is of no concern, since even the Department treats that carrier as generally not competitive with the Northern Lines (Br., pp. 38, 39, 41). Since the Milwaukee will be given access to Billings by conditions imposed here, the city, though served by three merging roads which theoretically "compete," will suffer little adverse competitive impact and should benefit from the addition of the Milwaukee to the competitive picture.

Similarly, Grand Forks, North Dakota, a class 1 station, is served by the main line of GN, but only by an NP branch line running a north-south route from Mahitoba (Exhs. 1, 3; Tr. 11691). Most east-west traffic through Grand Forks will thus be routed over the GN main line. Helena and Butte, Montana, are also located on the main line of one road but the branch line of the other (Exhs. 1, 3, 90; Tr. 500). Shipments between Helena and the east or west would naturally be routed over NP, as against GN routing which would require some 200 extra miles of transit through Montana. For these large cities, also, the "competition" of two roads is, to a great extent, illusory.

The largest Washington community where "monopoly" would result is Pasco (population 14,522). But Pasco is served by NP and SP&S—both of which converge upon the city and leave it in different directions. Pasco traffic to or from Portland or California points will move via the SP&S direct route; Pasco traffic to or from Seattle, Everett, and Yakima

will move via NP, since SP&S does not even serve those points (Exhs. 1, 3; Tr. 500). Because of these routing considerations, and because certain points are located only on one of the two roads, "competition" at Pasco is strictly limited to traffic moving between that city and Spokane (Tr. 500). Moreover, this "competition" is between one railroad (NP) and another (SP&S) in which it is already a partner.

In other instances the physical location of the shipper's facility, or of the track, strictly limits effective competition (Tr. 3127-3128, 3190-3191).[17] As explained by NP's traffic expert, "* * * you don't truck stuff from a sawmill located on one railroad over to another one that is a mile away" (Tr. 14685). The record is replete with examples. A pulp and paper manufacturer, annually shipping and receiving 4,500 cars at Bellingham, Washington, a community served by GN and NP, uses GN on certain shipments because "When your tracks are on the Great Northern Railroad, you would use the Great Northern Railroad" (Tr. 6033). Similarly, "competition" will supposedly be reduced at Rosalia, Washington, a small community served by GN, NP, and Milwaukee (Exh. 15, p. 94). Yet, as explained by the manager of a Rosalia agricultural cooperative—shipping 1,500 cars per year—with storage elevators on respective tracks of GN, NP, and Milwaukee, "As far as we are concerned down there, there isn't any place where they actually compete. They have the rails running

[17] To the same effect see *Chesapeake & O. Ry. Co.—Control —Baltimore & O. R. Co.*, 317 I.C.C. 261, 282 (1962).

through there and the elevators are in certain spots. They just get the haul on everything that comes in there" (Tr. 7390-7391). The traffic manager of a large Northern Tier shipper of fresh fruits, vegetables, and grocery items—with 40 facilities served by the Northern Lines—stated that "the locations of our various plants creates very much of our selection" of carriers (Tr. 5798). As put by a Montana grain dealer, with elevators near NP tracks:

> For the most part, the grain has to move on the railroad pretty close to where it is grown. For instance, I can't ship on the Milwaukee even if their rate was zero. [Tr. 13697-98.]

Shipper location may determine routing even in cities where cars can be moved from one road to another without charge under reciprocal switching agreements. In large cities, scores of shippers are located on or near the lines of each road, but at some distance from others serving the same city. This is apparent from a map of Seattle showing respective shippers along routes of GN and NP within the city (Exh. 4, attachment). The shipper may prefer the nearer road simply because reciprocal switching, even though available, will produce burdensome delays (Exh. 228, pp. 9-11).

(iii) Market Competition

The Department argues that shipments to or from points located on only one road are really competitive because these goods are in "market" competition with other commodities (Br., pp. 33-34). To be sure, there is always "market" competition in transportation.

However, the significant market competition in this case is not so much that between GN and NP shippers as that existing between the entire area served by both roads, as against other distant regions of the country. Both GN and NP must move products of the West long distances to the industrial and consuming markets in other parts of the country (Tr. 397, 483-484). And it has been observed that market competition tends, to some extent, to impose a ceiling upon rates which could be assessed even by a rail monopoly. *Pittsburgh and Lake Erie R. Co.* v. *United States*, 294 F. Supp. 86, 98 (W.D. Pa., 1968), sustaining *C.&O. Ry. Co.—Control—Western Maryland Ry. Co.*, 328 I.C.C. 684, 694 (1967). As the Commission found, the area served by the Northern Lines

> offers a limited market for its products. For this reason, the producers in the area are heavily dependent upon transportation. Because of the nature of the products and the distances involved, rail transportation to centers of population at costs low enough to permit participation in these markets is of primary importance. * * * [App. 253.]

Thus, for example, forest products from the Northwest, probably the most significant single source of traffic for the Northern Lines, compete strenuously with lumber produced in the South and Southeast (Tr. 432-434; 5360-5361); fresh fruits and vegetables from the Pacific Northwest compete with commodities produced in the East and Midwest (Tr. 434-435); apples from Washington compete with apples from Pennsylvania, Maryland, West Virginia, Vir-

ginia, New York, Michigan, Ohio, Wisconsin, Illinois, and Indiana (Tr. 435, 6081); beet sugar from the Northern Tier competes with other sugar moving up the Mississippi River or down the St. Lawrence Seaway (Tr. 418, 11201-11202); Washington pulp competes with products from the Southwest, the Northeast, eastern Canada, and the Scandinavian countries (Tr. 6022, 6038); potatoes from the Red River Valley compete with potatoes grown in other areas of the country closer to the centers of use (Tr. 418); oil from North Dakota and Montana competes with Canadian crude oil moving from other areas by barge (Tr. 420); and commercial salt, produced in North Dakota, competes with salt from Utah, California, Kansas, and Michigan (Tr. 423).

In this "market competition," there is thus a community of interest between GN and NP. The two roads are competing not primarily against each other but against other carriers bringing products to the consuming centers from other areas of the country. The existence of this market competition is rather a consideration supporting the merger. As pointed out by the merging lines and scores of shippers, the merger will strengthen the various roads in their effort to maintain a sufficiently low rate level for Northern Tier products to compete successfully with other goods.

(iv) Intermodal Competition

As one factor contributing to the decision at bar, the Commission found that shippers at competitively sensitive points were generally served by other modes

of transportation competing for traffic (App. 319). The Department attacks this finding on grounds that a narrow majority of Commissioners took a different view in the First Report and that intermodal competition is not especially meaningful in the Northern Tier. The arguments are without merit.

The First Report does not bar the Commission from subsequently re-examining the matter and reaching a contrary conclusion. As the lower court said, "* * * The Second Report is now the critical one. * * * The First Report's finding does not invalidate the conclusion in the Second Report." (App. 35). *Cf., American Trucking Associations* v. *A., T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967); *Campus Travel, Inc.* v. *United States*, 224 F. Supp. 146, 148 (S.D. N.Y., 1963); *R-C Motor Lines, Inc.* v. *United States*, 241 F. Supp. 124, 126-127 (M.D. Fla., 1965).

Moreover, the findings of the First Report appeared in the context of a conclusion that merger was not "the only means" of fending off intermodal competition (App. 139). In the decision at bar, however, intermodal competition was not the sole justification for the merger, but one factor in the Commission's conclusion that reduction of competition between the railroads should not have controlling weight (App. 319). The Commission's approach in the Second Report was correct. *Penn-Central Merger Cases*, 389 U.S. 486, 501 (1968); *Florida East Coast Railway Co.* v. *United States*, 259 F. Supp. 993, 1010, 1014-1015 (M.D. Fla., 1966), affirmed *per curiam*, 386 U.S. 544 (1967).

Significantly most of the recent important railroad "service" innovations owe their existence to the stimulus of intermodal competition and not rivalry between railroads. This is clearly so as to "piggyback" transportation; as to "jumbo" tank and hopper cars; and as to the introduction of cost-saving techniques and devices in hauling automobiles—all instances involving traffic once regarded as virtually the captive of the railroads. *Substituted Service—Piggyback*, 322 I.C.C. 301, 305-307 (1964), sustained *sub nom. American Trucking Associations* v. *A., T. & S.F. Ry. Co.*, 387 U.S. 397 (1967); *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 95 (1954); *Meats, Fruits, Vegetables — TOFC — Transcontinental*, 316 I.C.C. 585, 594 (1962) ("piggyback"); *Liquefied Petroleum Gas in Jumbo Tank Cars*, 319 I.C.C. 31, 40 (1963); *Grain in Multiple-Car Shipments—River Crossings to the South*, 325 I.C.C. 752 (1965) ("jumbo" tank and hopper cars); *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 517 (1966) and cases there cited (new techniques in hauling autos). Similarly, many important pricing efforts or innovations recently attempted by railroads were produced not by one road competing against another, but by competition from trucks or barges. See, *e.g.*, *American Commercial Lines, Inc.* v. *L.&N. R. Co.*, 392 U.S. 571 (1968); *Canned Goods Between Pacific Coast and East*, 332 I.C.C. 55 (1967); *Grain in Multiple-Car Shipments, supra; Grain-Idaho, Oregon and Washington to Ports in Oregon and Washington*, 326 I.C.C. 358 (1966).

Turning to the instant case, the record contains, as the lower court found (App. 34-38), substantial evidence showing the meaningfulness of motor carrier competition in the area. Most of the shipper witnesses, representing small companies as well as large, stressed the significance of intermodal competition in supporting the merger. Numerous Northern Tier witnesses described incursions by motor carrier into traffic in paper products, pulp, manufactured goods, steel and related products, sheep, cattle, hogs, cement, salt, lime, vegetables, fruit, grain, wood poles, piling, lumber, and hardboard products (Tr. 5754, 5810, 6024, 6032, 6126, 7224-7225, 7227, 7242-7243, 7432, 7573, 9527-9528, 9815, 11371-11372, 11705-11707, 11837, 11913, 13690-13692; Exh. 222, p. 10; Exh. 223, p. 3).

The traffic manager of a large purchaser and distributor of fresh fruits and vegetables and grocery items—with 42 facilities in Washington, Montana, North Dakota, and Minnesota—testified that about 65% of the company's shipments of perishables and 30% of its grocery items now move by truck (Tr. 5810). Another witness, though recognizing that certain paper goods products had moved predominantly by rail in the past, stated:

> * * * With the ever-increasing trends toward decentralization, warehousing and inventory control, much of this tonnage is now susceptible to truck transportation. If the railroads are going to hold or recapture this tonnage, there must be improvements in transit time, car supply and services. [Tr. 7432.]

Similarly as to livestock, there was evidence from Washington wool growers to the effect that where the railroads had once carried the majority of shipments of sheep, wool, feed, and supplies, the versatility of trucks had left the roads with "a relatively small proportion of the transportation requirements of our members * * *." (Tr. 7242-43.)

Grain, long regarded as essentially a "rail" commodity, is now clearly susceptible to diversion. One Montana elevator operator testified:

> Over the last four years all of our shipments . . . were handled by the Northern Pacific. However, beginning in 1958, this situation has radically changed. In 1958, 21 per cent of my outbound grain shipments were handled by truck; 1959, 27 per cent; 1960, 58 per cent; 1961, 83 per cent; and 100 per cent by truck to date this year . . . . [Tr. 18690.]

The General Manager of a Montana grain elevator concern, with 27 facilities located on Montana railroads, stated that "The loss of traffic is to be feared more from the trucks than from competitive rail carriers" (Exh. 222, p. 10). A Montana representative of Cargill, one of the largest grain firms in the United States, was of the view that "The losses of grain traffic by all railroads in Montana have been because of the movement of grain by truck" (Exh. 223, p. 3). Grain movements by truck from various points to Duluth-Superior increased from 1% in 1957 to over 25% in 1961 (Tr. 517).

The effectiveness of intermodal competition for grain has been recognized in recent Commission deci-

sions dealing with railroad pricing efforts designed to recapture the traffic. See *Grain in Multiple-Car Shipments, supra; Grain from Idaho, Oregon and Washington to Ports in Oregon and Washington, supra.* As recently as this year, the Great Northern, relying upon competition from exempt trucks and barges, received permission for "fourth section" relief to reduce rates on grain and grain products moving from Montana to San Diego for export (Fourth Section Application No. 41601, filed March 31, 1969).

While the rails will always enjoy an advantage as to certain long-haul traffic, they are not immune to motor carrier competition. The average length of haul of Class I carriers operating in the merger territory in 1959 was 402 miles (Tr. 523).[18] Comparable figures for GN and NP, respectively, are 381 miles and 462 miles for 1959. For 1967 the GN and NP average length of hauls were 406 and 443 miles, respectively. *Transport Statistics in the United States*, 1959, Section A-1 (Bureau of Accounts, I.C.C.); *Statement Q-220*, Fourth Quarter, 1967 (Bureau of Accounts, I.C.C.).[19] Planned construction of

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[18] A Class I motor carrier has annual gross operating revenues of over $1 million.

[19] Even if, as the Department suggests, numerous railroad interchanges somehow modify the length of haul figures (Br., p. 48, fn. 38), this does not detract from the significance of intermodal competition, vis-a-vis rail rivalry. "The fact that a carload of freight shipped across the United States could be routed over segments of twenty or more carriers does not indicate competitive structure. Since the connecting carriers must cooperate in routing, interchange, and pricing for such shipments, they are independent decision units of a competitive market." Conant, *Railroad Mergers and Abandon-*

new interstate highways between Chicago, the Twin Cities, and Seattle will enable motor carriers to haul between Twin Cities and Seattle over a route 241 miles shorter than that utilized by NP (Tr. 516). The same highway will reduce truck travel from 60 to 36 hours, as compared with 43½ hours, the fastest rail freight time for that distance (Tr. 1474; Justice Exceptions, p. 157; Northern Lines Reply to Exception, p. 72). Various technical improvements in trucking equipment—including increases in cubic capacity and two driver sleeper cab runs—have also strengthened the motor carriers in competing for long-haul business (Exh. 103, p. 118).

Grain moves to the Twin Cities and Duluth-Superior by truck in 400 mile hauls (Tr. 516). A grain dealer at Laurel, Montana, utilizes trucks for carriage to coastal points and to the Twin Cities area (Tr. 13695). A shipper of fruit from Yakima, Washington, testified that only 30 percent of his shipments presently move by rail; that there is "a significant shift" from rail to truck; and that he was "astounded" at the amount of truck movement even to Kansas City (Tr. 7224-7227), a distance of over 1,000 miles. Moreover, there was evidence showing imminent shipment of fruit by truck from the State of Washington to Philadelphia (Tr. 7573). The St. Regis Paper Company ships goods by truck from Tacoma to mid-

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ments (University of California Press (1964), p. 26). Some truckers can haul goods from Seattle to Chicago or, indeed, from Seattle to Boston without interchange (Exh. 17, pp. 28-29)—which neither GN nor NP can do. This clearly gives the motor carrier the competitive advantage for certain shipments of certain commodities.

western points if time requirements so warrant (Tr. 5754-5755). Potatoes move by truck from Washington to various California destinations (Tr. 5796). The Hormel Company ships meat by truck from Minnesota to Portland and Seattle (Tr. 10734).

Of course, the largest share of the motor carrier business arises out of "manufacturing and miscellaneous" commodities. But these manufactured commodities are also crucial to the Northern Lines. This traffic moves at higher rates than the bulk commodities, is routed primarily from eastern points into the Northern Tier, and enables the roads, to some extent, to offset imbalance in traffic caused by their need to haul the bulk commodities over long distances from originating to consuming areas (Tr. 440; App. 253-254). While the trucks undoubtedly make their greatest inroads upon this traffic, it is, as the Commission found, the very traffic which the Northern Lines "must retain to balance their operation." (App. 254).[20]

The total merger territory is served by 248 truck lines filing reports with the Commission (Tr. 523).

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[20] The Department would minimize the significance of the "manufacturing and miscellaneous" traffic on the theory that the Northern Lines together increased their revenue in this category by some $9.9 million as between 1960 and 1963. But Class I motor carriers operating in the Northwestern and Rocky Mountain regions—an eleven-state area, including Minnesota, North Dakota, Montana, and Idaho—with less combined gross revenue than that of GN and NP, increased their revenue from "manufacturing and miscellaneous" traffic by some $61.1 million between 1960 and 1963. "Motor Carrier Freight Commodity Statistics," 1960 and 1963, I.C.C., Bureau of Transport Economics.

Between 1947 and 1959, 212 of these companies have shown growths of 362% in operating revenues, 163% in tons of revenue freight, and 260% in ton miles (Exh. 17, Statement M, p. 1). Growth of such magnitude is especially significant compared with GN and NP, whose operations through the years have never reflected any such dramatic increases. The Northern Tier is served by Consolidated Freightways and Pacific Intermountain Express—two of the largest trucking companies in the United States—which compete with the Northern Lines for traffic moving between Seattle, Tacoma, Portland, Spokane, and the Twin Cities (Exh. 17, pp. 28, 29).[21] One of these carriers recently consummated an acquisition enabling it to offer "* * * single-line, coast-to-coast, transcontinental service * * *." *Pacific Intermountain Express Co. — Control and Merger — All States Freight, Inc.*, 101 M.C.C. 137, 146 (1966). Over many parts of the Tier, these companies parallel the rail lines, serving intermediate points such as Yakima, Washington; Missoula, Helena, Great Falls, Bozeman, Butte, and Billings, Montana; Fargo and Bismarck, North Dakota; and Moorhead and St. Cloud, Minnesota.

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[21] Consolidated and P.I.E. are ranked 19th and 39th, respecitvely, among the Nation's 50 largest transportation companies. GN and NP are 23rd and 25th, respectively. For 1968 the combined Consolidated-P.I.E. operating revenue was $522.9 million, as compared with $527.1 million for GN and NP combined. "The 50 Largest Transportation Companies," *Fortune*, May 15, 1969, pp. 196-197. Annual Reports on file with the Commission for 1967 showed that Consolidated and P.I.E. ranked second and fifth among the Nation's Class I motor carriers.

The larger points where rail competition will be reduced or eliminated are served by several motor carriers. At Pasco, Washington, 6; at Grand Forks, North Dakota, 5; and at Moorhead, Fergus Falls, St. Cloud, and Anoka, Minnesota, there are 11, 4, 4, and 6, respectively (Ex. Rept., p. 196). Fargo, as noted earlier, served by 10 "substantial" motor carriers and 10 smaller ones, receives as much as 50% of its less-than-carload "merchandise" shipments by truck (Tr. 11660). Duluth-Superior is served by 18 motor carriers; the Twin Cities by 78; Spokane by 15; and Seattle by 35 (App. 318).

There are also substantial competitive operations by motor carriers whose operations, in whole or in part, are exempt from regulation. In 1958, for example, such truckers handled more than twice the ton miles of regulated carriers (Tr. 518). Because of the "agricultural" exemption in the Motor Carrier Act, truckers have virtually complete freedom to handle agricultural products without publication of rates or obligation to avoid discrimination, preference or prejudice. This enables the trucker, bringing manufactured goods into the Northern Tier, for example, to obtain return-haul movements of agricultural goods which may be "boldly quoted" at a certain amount below the current rail rate (Tr. 443). This situation has enabled the motor carriers to obtain the advantage of balancing their traffic and has seriously eroded rail agricultural revenues through the years (Tr. 444). For example, a Montana grain dealer diverted all of his shipments from rail to exempt trucks, in part because the trucking rates fluctuate even

from day to day (Tr. 13705). A shipper representative with vast experience in traffic management, speaking for some 230 Pacific Northwest shippers, also emphasized the nature and growth of exempt motor carrier transportation of agricultural commodities (Tr. 7190-7191; Exh. 103, pp. 10-12, 19-20). And, as noted *supra*, the force of unregulated truck and barge competition is reflected in recent "fourth section" relief obtained by GN as to export grain.

Finally, the Northern Tier is subject to competition from two major waterways. The Columbia River flowing from Pasco, Washington, to the Pacific, virtually parallels the SP&S rail line (Exh. 17, p. 33). Grain moving by barge on the Columbia River increased from 52,000 tons in 1946 to 740,000 tons in 1959, and again to over 1 million tons in 1960 (Exh. 17, p. 4; *Grain—From Idaho, Oregon and Washington, supra*, at 360)—a rate of increase well above that of the Nation's waterways as a whole (Tr. 528, Exh. 17, pp. 1, 37). Planned improvements as to the Columbia River waterway will result in further strengthening barge competition because more barges can be towed in one haul with corresponding rate reductions (Exh. 230, p. 10). Grain traffic moving from the Twin Cities on the Mississippi River increased from 151,000 tons in 1946 to 4,135,000 tons in 1959 (Exh. 17, p. 34). Considering the growth in truck carriage of grains, generally unregulated and involving lower rates, from outlying areas to the Twin Cities (Tr. 516-517), the competition afforded by this cheaper truck-barge route is obviously significant for the Northern Lines.

(v) Views and Practices of Shippers

A railroad's consumers or "customers" are its shippers. In a merger case, where preservation of competition is urged as controlling, it is critical to examine, as the Commission did (App. 320), the views of those most personally and intimately affected—those for whose benefit the competition would continue. As observed by one court in sustaining a recent rail consolidation, "Shippers are the primary source of all freight traffic and their opinions are, accordingly, of impressive weight." *Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19, 26 (E.D. Mich., 1963), aff'd *per curiam*, 375 U.S. 216 (C&O acquisition of B&O).

Virtually all railroad "customers" appearing in this case supported the merger as ultimately approved. These were commercially sophisticated men regularly involved in the daily problems of trying to move goods, in hundreds of thousands of freight cars from one place to another. These shippers and receivers functioned under GN-NP competition for years; they knew all about it; they were well aware of available competitive routes, as well as the limitations and problems thereby created. Yet these people —who might well have had the greatest personal stake in preservation of rail competition—endorsed the merger anyway, finding on balance that its transportation benefits were compelling. In short, they were concerned not with abstract theory, or competition as "good thing," but with the prospect of shipping more goods from place to place—with more cars moving faster to a greater number of points at con-

ceivably cheaper prices. Thus support for the merger as conditioned came from many shipper and public groups located in the very states and points where the competitive consequences are said to be so severe.[22]

The merger was directly supported by 237 shippers and receivers of freight; by 39 shipper associations representing nearly 500,000 members; and by 66 organizations including governmental bodies, chambers of commerce, and local traffic bureaus (App. 749). In addition, the Milwaukee intro-

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[22] Billings Traffic Bureau and Chamber of Commerce (Tr. 13810, 13779); St. Paul Area Chamber of Commerce (Tr. 10089, 10286); Minneapolis Traffic Association and Chamber of Commerce (Tr. 3704); The Port of Everett, Washington (Tr. 6155-61); Everett Chamber of Commerce (Tr. 6182); Butte Chamber of Commerce (Tr. 12791); Spokane Chamber of Commerce (Tr. 7292); Bemidji, Minnesota Chamber of Commerce (Tr. 10406); Fargo, North Dakota Chamber of Commerce (Tr. 11645); Port of Tacoma and Tacoma Chamber of Commerce (Tr. 6161); Grand Forks, North Dakota Chamber of Commerce (Tr. 11688); Whatcom County Traffic and Rates Bureau, Bellingham, Washington (Tr. 7122); and the Seattle Traffic Association and Chamber of Commerce (Tr. 6205); Washington State Farm Bureau (4500 members, Tr. 5709); Northwest Horticultural Council (representing virtually all Washington fruit growers, Tr. 5661); Washington Cattlemen's Association (3500 members, Tr. 6040); Farmers' Grain Dealers Association (410 North Dakota grain elevator operators, Tr. 11141); Western Sugar Beet Growers Association (nearly 4000 growers throughout Northern Tier and Iowa, Tr. 11196); North Dakota Stockmen's Association (2500 members, Tr. 11856); Minnesota Farm Bureau Federation (30,000 members, Tr. 3985); North Dakota Farm Bureau (16,000 members, Tr. 11055); Montana Stockgrowers Association (most Montana livestock producers, Tr. 12471); Montana State Grange (1500 members, Tr. 12441); and the Montana Farm Bureau Federation (292 members, Tr. 12650).

duced testimony from 117 shippers and public witnesses, most of whom also supported the merger as conditioned. In all, these witnesses spoke for hundreds of thousands of shippers and receivers. The Department of Agriculture, the Nation's largest shipper of agricultural commodities, supports the merger as conditioned by the Commission.

In analyzing the impact of the merger at certain competitive points, the Commission said:

> * * * apportionment of traffic between GN, NP and the other roads serving these points is not wholly the result of interplay of competitive forces, but often results from other factors entirely (App. 319).

Accord: *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 511 (1966). This was fully borne out by the evidence. For example, the General Traffic Manager of the Quaker Oats Company (moving some 11,000 cars annually over the merging lines), testified that rail competition had not been of assistance to the growth of his company, giving more emphasis to "good car supply and good service" (Tr. 8050-51). A traffic official of the Ford Motor Company testified that competition between the merging lines had never been an important matter to his company, which always considered the railroads as one system (Tr. 8127). A witness for the National Biscuit Company viewed rail competition as merely "a very small part of the overall competition" and "not necessary" (Tr. 8299). What the Department condemns as a "classic horizontal merger" (Br., p. 20) is, at the same time, "the rankest kind of du-

plication" to a shipper of 12,000 carloads annually over these roads (Tr. 7850-7851). To that witness, a man with nearly 40 years of traffic experience and, an annual railroad bill of $80 million, rail competition could not be described "a good thing" without important qualifications (Tr. 7866-7870).

Many shippers testified that competition between roads was nowhere near as important as that between the railroads and other modes of transportation (*e.g.*, Tr. 5795, 7866-7870, 7972, 7866, 3875, 8105, 8274-8275). Several witnesses located at competitive points saw no distinction in service as between competitive and non-competitive points (Tr. 3618, 3640-3641, 3887-3888, 5758, 8127, 8574). The St. Regis Paper Co., with 11 Northern Tier facilities, experienced no difficulty in obtaining desired service at non-competitive points; indeed, its witness described rail service as "superb" even when one road monopolizes a given point (Tr. 5758). As stated by the General Traffic Manager of Kimberly-Clark, "* * * I would say there is not much difference between those mills served locally and those mills served jointly." (Tr. 8574). Many witnesses did not agree that rail competition had a tendency to lower rates (Tr. 6135-36, 6983, 6990, 7138, 7499, 7972, 8174-75, 8198, 8816, 9713, 9819, 10547, 10885-86, 12543, 12690).[23]

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[23] The Department relies upon the testimony of numerous witnesses suggesting the ostensible benefits of rail competition (Br., p. 60). But virtually all of these witnesses were either outright supporters of the merger (*e.g.*, Tr. 3706-3707, 4222, 4833-36, 5968, 6183, 7460-62, 8179-80, 9796-98, 11333-37, 12522, 12853-54), or supporters of the Milwaukee conditions (subsequently imposed by the Commission) who did not

Shippers also complained as to by-products of the very competition which the Department insists upon preserving. The record is rife with complaints as to car shortages—existing even when there is a dearth of cars on one merging road but available cars on another (Tr. 3470, 5704-5705, 5836, 8227-8228, 9498-9499). To some extent, as the Commission noted, this situation is caused by the fact that each competing road, considering its own interest, retains as many cars as possible for its own use (App. 309; Tr. 574-577). Similarly because each competing road

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oppose the merger (*e.g.*, Tr. 6571-75, 6881, 8808-09, 10180-87, 12598-12600). The witnesses spoke in the abstract in response to generalized leading questions propounded by counsel for the Department (*e.g.*, Tr. 6126, 6965-66, 8866-68, 8931-32, 10118-20). Some of these witnesses had no experience with GN-NP competition, or were located on one road and had no competitive experience (*e.g.*, Tr. 8866-8868, 8921, 9048-51). Many of the very witnesses mentioned by the Department also testified to the existence of significant intermodal competition. (Tr. 6024, 6702, 6990, 7241, 7252, 7353-54, 7497-7500, 7640, 7645, 9068, 9081-82, 12617-18).

The Department also singles out the testimony of two witnesses as showing the desirability of locating industry at points served by more than one road. One witness was an outright supporter of the merger and also testified that rail competition was neither significant nor necessary (Tr. 8299). The other witness (Tr. 6815, 6822), a professional economist retained by the Milwaukee, did not oppose the merger. On the other hand, a witness for a mineral and chemical concern, shipping some 10 million tons per year by rail, explained that the condition of the railroad, availability of special equipment, and existence of other types of transportation were more important than competitive roads in locating plants (Tr. 8932). The traffic manager of a large Northern Tier fruit and vegetable shipper testified that his company's plants "* * * grow like Topsy. We didn't locate on certain lines just for competing services." (Tr. 5799).

seeks to preserve its long haul, shippers' "transit" privileges generally exist only for stations on the line of the particular originating road (Tr. 449-450). These privileges—critical for the commodities such as certain forest products, which must be fabricated, processed, or stored somewhere en route to destination—enable the shipper to move the goods at lower through rates. The same consideration applies to "stop off" privileges utilized when cars need to be stopped for partial unloading en route to destination. Yet rail service competition, with each road protecting its own long haul, often deprives the shipper of such transportation advantages. As expressed by the dissenters in the First Report (App. 175):

> The evidence is clear and overwhelming on the harm perpetrated by the competitive situation as it is today in applicants' territory and will continue to be as a result of the majority's decision. Gateways are barred; routes are restricted; transit, stop-off and diversion privileges are severely curtailed; shippers are held captive to the Northern Lines over great distances; shipper access to markets and sources of supply is limited; * * *.

Finally, there was evidence that some shippers "share" traffic with available roads, rather than choose the best "competitor." As the Commission found in the C&O-B&O acquisition, "As a matter of policy, national account traffic generally is allocated proportionately among the various competing railroads." (317 I.C.C. at 282). For example, such large shippers as the Weyerhaeuser Company, Crown Zel-

lerbach Corporation, the Boeing Company, and the St. Regis Paper Company all follow a policy of dividing or splitting traffic among the various railroads serving an area (Exh. 230, p. 17; Tr. 5751, 5757, 6200, 6583, 14687-14689). As stated by the traffic manager of a Minnesota hardboard manufacturer, shipping 3,000 cars per year, his company endeavors "to give all the participating lines in Duluth pretty much of an equal breakdown in business" (Tr. 9804). For shippers applying this consideration, it is not so much competition, as mere sharing which determines the choice of railroad.

f. Milwaukee's Handicaps and the Merger Conditions

The Milwaukee Railroad, though competing with GN and NP through most of the Northern Tier, is presently restricted by geographical and other handicaps. First, as explained by the lower court, Milwaukee's lines are "blunted" by reaching neither Portland, Oregon, nor Bieber, California—major interchanges or "gateways" for east-west transcontinental traffic and north-south coastal traffic (App. 27-28). Thus while both Northern Lines have long been rate-making transcontinental railroads, the Milwaukee can participate in certain transcontinental traffic only at the sufferance of competing railroads, since it cannot reach Portland without interchanging with either the Northern Lines or Union Pacific, and cannot establish rates without the concurrence of the other railroad. For the Milwaukee, this has created slower transcontinental service to or via Portland which is simply not competitive with that offered by

Northern Lines or UP. Then, too, Milwaukee has a long gap in its trackage from the Canadian border to Seattle, with the result that Milwaukee traffic can interchange traffic with the Canadian lines only with numerous interchanges and cooperation from one of the Northern Lines.

Additionally, it has been the practice for each Northern Line to maximize its own long haul by imposing high rates when traffic is routed over GN or NP for interchange with Milwaukee at a point which would give the Northern Lines less than their longest possible haul. This has the effect of keeping traffic on the Northern Lines and away from Milwaukee. Such traffic moves over GN and NP to their most distant junction, where it is only then turned over to Milwaukee for the short haul. If Milwaukee is the originating carrier, it again receives the shortest haul, with the great portion going to the Northern Lines.[24] Finally, the Milwaukee does not run to Billings, the second largest city in Montana, and an important distributing and jobbing center (Tr. 13780-82, 13788), where some 18,000 rail cars originated or terminated each year (Tr. 6433). Milwaukee cannot now participate in this traffic.

By virtue of the Commission's power under Section 5(2), to attach conditions to a rail merger, this case

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[24] For example, a car going from Milwaukee, Wisconsin, to Vancouver, Washington, could be carried by the Milwaukee to within a short distance of Vancouver, and thence over one of the Northern Lines to destination. But because of Northern Lines' tariff practices, Milwaukee may only haul the car to Twin Cities from which point it is taken by the Northern Lines all the way to Washington (Tr. 6409).

became the vehicle for the imposition of conditions which would remove these and other handicaps and, in the Commission's view, convert Milwaukee into a transcontinental competitor.[25] From the inception of the proceedings, Milwaukee took the position that the Northern Lines merger would be in the public interest only if certain specific conditions were adopted for its benefit. As its president testified,

> We, therefore, oppose this merger unless the Milwaukee conditions are imposed by the Interstate Commerce Commission. With them, the Milwaukee can better remain an effective competitor, physically and financially able to provide a rail transportation service adequate for the public need (Tr. 6240).

The Northern Lines then strenuously opposed all of the conditions, contending that their imposition would divert millions from the merged company, and might be so costly as to preclude consummation (App. 93). The Commission, in both reports, consistently viewed the Milwaukee conditions as essential to the public interest (App. 93, 328-331). In the decision at bar, the Commission imposed all of the conditions sought by Milwaukee.

As to the Portland handicap, the Commission, as a condition to the Northern Lines merger (App. 450), required the merged company to grant Milwaukee trackage rights into the city. This, as the lower court said, will enable Milwaukee to compete with the

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[25] Conditions were also imposed for the benefit of the Chicago and Northwestern, the Soo Line, and other roads (App. 328-334, 439-454, 480-494).

Northern Lines' transcontinental routes (App. 29). By connecting with Southern Pacific at Portland, for example, Milwaukee will be able to offer Chicago (and intermediate) shippers a competitive service to California and Oregon points. This condition places Milwaukee in a position to compete, for the first time, for this transcontinental traffic.

As to the "short hauling" of the Milwaukee, the Commission required the Northern Lines, as a merger condition (App. 449, 493), to open for the Milwaukee eleven "gateways" on their Northern Tier tracks. The opening of these areas (2 in North Dakota, 6 in Montana, and 3 in Washington) affords Milwaukee the opportunity to compete effectively, for the first time, for traffic now confined to the Northern Lines. Milwaukee will be able to offer competitive rates and solicit traffic for its own long haul. At the same time the condition will give many shippers, including those of the Northern Tier, "a realistic choice of railroads for the first time in history" (App. 311).

As to Billings and the north-south coastal handicap, the Northern Lines were required to handle Milwaukee traffic to, from, and through Billings (App. 451), and to grant Milwaukee trackage rights over a 102-mile line in northwest Washington (App. 450-451), which will enable the carrier to offer competitive single-line service between British Columbia and Portland. The Milwaukee will also be strengthened by a condition requiring elimination of the existing basis of switching charges (App. 451), whereby shippers at some points where Milwaukee competes with the Northern Lines, must pay a higher switch-

ing charge to move traffic via Milwaukee than via one of the Northern Lines. A final condition requires that whenever existing Northern Lines' rates are adjusted after merger, a comparable adjustment will be made on competing traffic interchanged by the merged company with Milwaukee (App. 451-452).[26]

The Department's attempt to deprecate the Milwaukee conditions (Br., pp. 50-54) is wholly at odds with their evaluation by the lower court, the Commission, the Milwaukee itself, numerous Governmental units—including the Department of Agriculture (the Nation's largest shipper of agricultural commodities)—and hundreds of other shippers, associations, and groups. As stated by the Department of Agriculture, speaking primarily of the Milwaukee conditions

> The Secretary's position in regard to the proposed merger has been that considerable benefit could accrue to the agricultural community

[26] The benefit of the conditions could not have been achieved by independent means. Nothing in Sections 1(4), 3(4), or 15(3) of the Interstate Commerce Act would have empowered the Commission to grant Milwaukee trackage rights to points it does not now reach—Portland and Billings—and over the 102-mile stretch in northwest Washington. Nor could the Commission have opened "gateways" to Milwaukee under Sections 15(3) and (4) in view of the "short-haul" and other restrictions embodied therein. Commission attempts to relax the "short-haul" restrictions on the establishment of through routes have been uniformly rejected by Congress and the courts. See *Chicago, Milwaukee, St. P. & P. R. Co.* v. *United States*, 366 U.S. 745 (1961); *Thompson* v. *United States*, 343 U.S. 549 (1952); *United States* v. *Great Northern R. Co.*, 343 U.S. 562 (1952).

> provided certain conditions were imposed that would open gateways to competing railroads thus creating more vigorous competition.
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> * * * *
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> If these conditions were to be imposed by the Commission, we believe that additional benefits would be furnished to agriculture and the public.[27]

The Commission repeatedly found that Milwaukee, with the advantage of shorter routes and superior grades, would, by virtue of the conditions, become a transcontinental carrier capable of providing genuine competition to the merged company (App. 311, 315, 321, 322-323, 344, 468, 475, 486, 500-501). Evaluation of conditions imposed in a rail merger proceeding is particularly a matter for the judgment of the Commission. *Erie-Lackawanna R. Co.* v. *United States*, 279 F. Supp. 316, 328, 353-354 (S.D. N.Y., 1967), aff'd *sub nom., Penn-Central Merger Cases, supra; Florida East Coast Ry. Co.* v. *United States, supra*, 259 F. Supp. at 1016, aff'd *per curiam*, 386 U.S. 544; *Pittsburgh and Lake Erie R. Co.* v. *United States*, 294 F. Supp. 86, 99 (W.D. Pa., 1968).

These conditions unquestionably strengthen the Milwaukee, and create new competitive service at several significant points. For transcontinental shippers concerned with Oregon and northern California; for west coast shippers concerned with British Co-

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[27] Reply of Secretary of Agriculture to Petition for Reconsideration (filed October 24, 1966).

lumbia, Bellingham, Everett, and Seattle; for any shipper or receiver considering Billings; and for any shipper electing to utilize Milwaukee via the eleven new Northern Tier gateways, there is clearly additional competitive rail service. As summed up by the court below (App. 31):

> The evidence gives substantial support to the conclusion of enhanced competition by Milwaukee, with traffic diversions to it from the merged lines. The Commission's reliance upon this factor in reaching its conclusion that the merger was in the public interest must be accepted as valid, even though the merged lines will have a larger market share than Milwaukee. Milwaukee, by no means a negligible competitor previously, will become for the first time a much strengthened competitor, realistically vying for long haul traffic at every major point served by Northern Lines. * * *

The conditions are probably worth somewhere between $12.8 million and $19.2 million annually.[28] An

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[28] The First Report valued the conditions at $14.8 million (App. 129). The Billings condition, not covered in the First Report, is shown by the record to be worth $1.2 million (Tr. 6477, 6488; Exh. 244, p. 28). Applying a 20% "contingency" allowance—which might either reduce or increase the valuations (Tr. 1813-1814)—the conditions may be viewed as the equivalent of $12.8 million to $19.2 million in additional annual revenue. Actually this figure is quite conservative. It does not reflect either recent rate increases or traffic which Milwaukee will take away from UP by means of the Portland condition—estimated at $1.7 million annually by UP (App. 470). The Department does not question the accuracy of the computations ascribed to Commission counsel (Br., p. 53); and, as we have shown, the component figures are drawn directly from the record.

increase of this magnitude in gross income, while substantial in itself, may well result in a proportionally greater contribution to net income. Due to large fixed costs, even relatively small fluctuations in rail gross revenue have greater impact upon the net. See Locklin, *Economics of Transportation* (1966), p. 134. For example, if only $3 million of the income produced by the conditions (25% of the most conservative estimate of the gross) carried over into net income, Milwaukee's net income as a railroad would be increased more than 100%—as against the figure of $2.6 million reported for 1968 (Rail Form A, Annual Report, 1968). Under any view, therefore, the conditions attached to the Northern Lines merger for the benefit of Milwaukee will have a substantial favorable impact upon that carrier. Rejection of the merger, and thus of the conditions,—in the name of "preservation of competition"—would, as the Commission found, "relegate the Milwaukee to an increasingly marginal and deteriorating role" (App. 321). In these circumstances, the Commission acted well within its discretion in looking to the enhancement of the Milwaukee both as countering the loss of GN-NP competition to some extent, and as an affirmative benefit in itself.

2. *The Commission Properly Concluded that the Benefits of the Merger Outweigh the Loss of GN-NP Competition.*

The Commission concluded on balance that the merits of an appropriately conditioned merger outweighed the loss of such competition as exists between GN and NP. (App. 315, 321, 343-344, 475-

476). There were, as the Commission found (App. 298-311), many important benefits which would occur through this merger. Indeed there has never been any real dispute as to this fact. As far back as 1930, the Commission found that merger of GN and NP was in the public interest because it would produce economies, increase efficiency, and improve service. *Great Northern Pacific Ry. Co. Acquisition*, 162 I.C.C. 37 (1930). In 1966 even the majority in the First Report concluded that the merger could produce as much as $25 million in annual savings (App. 164), and stated "* * * it is clear that many shippers would receive better transportation service" (App. 161). In the Second Report, the Commission found (after the further hearings) that the savings would be even greater—in excess of $39 million annually (App. 259)—and that the merger would bring about a variety of important gains for the shipping and receiving public (App. 305-311).

a. Savings

Savings of the magnitude achievable here constitute, as the Commission found, "tangible benefits" for the lines (App. 298). These roads, though "relatively healthy" as railroads (App. 279), are not without problems. Thus their pre-tax rail income through the years reflects a general declining trend (App. 298-299).[20] This is especially significant, considering

[20] The Commission's findings deal with the years 1951-1965. The downward trend continued in 1967 and 1968 despite temporary improvement in 1966. (Rail Form A Annual Reports, 1966-1968).

that other modes of transportation have shown dramatic growth over the same period. These roads have, as the Commission found, lost a "steadily increasing share" of the market to competitors (App. 298). Moreover, the merging lines have earned consistently poor rates of return. For 1965 and 1966, for example, their rates of return were below the average for Class I roads, below that of other industries, and even below the yield on nonrisk government bonds (App. 299). Continued low rates of return, as observed by the Commission here, pose obstacles to the attraction of investment capital and to the railroads' own decisions as to investment of funds (App. 299). Considering that railroads are critically dependent upon private capital for funds (App. 298) the need to compensate for declining income and low rates of return is even greater. In this context, annual savings of some $40 million are of obvious importance.

The Department contends that resulting cost savings cannot justify a merger of competing railroads because "they are not necessarily passed on to shippers or even reserved for transportation aspects of a merged company's conglomerate business" (Br., p. 56). The Department points to nothing specific, and the argument is wholly speculative. The contention, if valid, would have been equally applicable in *McLean*, *Seaboard Coast Line* and *Penn-Central*. Moreover, it flies in the face of a fundamental assumption of the Congress, from the Transportation Act of 1920 to date, that such economies will aid in securing an adequate system of rail transportation. *N.Y. Central Securities Co.* v. *United States*, *supra*.

As recently as the *Penn-Central Merger Cases, supra,* this Court recognized that substantial merger savings will produce improved transportation. Thus (389 U.S. at 493, 501), this Court noted, with apparent approval, that

> * * * There are 32 urban areas in which the two lines are in competition with each other and in which no other rail facilities are available. The two roads operate at 160 common points or junctions and have a substantial amount of parallel trackage and routes. The proposed merger which the ICC has approved contemplates the unification of these vast roads and, as time goes on, the rationalization and elimination of some of the dual facilities and services in various areas and in various respects. The merger will result in "enormous savings in transit time." It is estimated that in eight years, the savings in expense will amount to more than $80,000,000 annually. * * * The Commission emphasized that the merger would enable the unified company to "accelerate investments in transportation property and continually modernize plant and equipment . . . and provide more and better service." * * *

Clearly merger savings should be reasonably reflected in subsequent transportation operations, as the Commission indicated here (App. 305-306; see also Ex. Rept., App.). Indeed the Commission has already considered the effect of the instant merger in concluding that NP should be required to continue running certain passenger trains between Fargo and Seattle. *Northern Pacific Ry. Co. Discontinuance of Trains,* 333 I.C.C. 15, 35-36, 39 (1968).

After noting testimony of a high NP official in the instant merger case, the Commission stated (333 I.C.C. at 39):

> * * * We conclude that continued operation is required by the public convenience and necessity. Unquestionably the trains should be maintained if any carrier can be found which is financially able to maintain them. Such a carrier is the Northern Pacific. But, ignoring the Northern Pacific for the moment, one carrier *both willing and able* is Burlington Northern, Inc., the product of the successful application in the *Merger* proceedings. Although it is not yet in existence, we know that the new carrier will begin life in a strong financial condition and that in its bid for merger approval, it expressed willingness, even eagerness, to maintain both the Mainstreeter and the North Coast Limited. These and similar unusually specific pledges about continued and improved service unquestionably contributed to the public support the merger received and helped to dissolve the opposition. The promises were carefully stated under oath on the record in the merger proceeding; and we have every confidence that these promises will be honored as a covenant with the public whose support they, in effect, purchased. * * * [Emphasis in original.]

Similarly the Commission has on several occasions noted the Penn-Central merger savings, and forecast profits for that carrier, in the course of requiring continuance of certain passenger trains. *Pennsylvania New York Central Transportation Co., Discontinuance*, 333 I.C.C. 638, 650 (1968); 333 I.C.C.

674, 690-691 (1968); *Penn Central Company Discontinuance*, 333 I.C.C. 736, 755 (1968); *New York Central Railroad Co. Discontinuance*, 333 I.C.C. 882, 890 (1968). Then, too, the Commission has reserved jurisdiction over the instant merger (App. 455-456, 479-480) and retains power under Section 5(9) of the Act to enter certain supplemental orders. *Cf.*, *B.&O. R. Co.* v. *United States*, 386 U.S. 372, 387 (1967). Indeed in the *Penn-Central* case, the merged company has been required to file post-merger reports covering many operational aspects, including the achieving of savings.

The Department further contends that cost savings cannot serve as a justification for the proposed merger because "studies of recent mergers have shown that savings generally fall short of the proponent's estimates, and that large unifications frequently produce serious diseconomies of scale" (Br., p. 56).[30] There is no support in the record for either of these propositions. Generally, the larger rail mergers approved by the Commission have been consummated too recently to provide support for any such generalizations. In the *Seaboard-Coast Line* and *Penn Cen-*

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[30] The Department relies principally upon "Western Rail Mergers," a pamphlet issued by an office in the Department of Transportation. The document states that it does not represent the views of the Department or the Executive Branch. As to savings, that document, in turn, rests primarily upon an unpublished Ph.D. dissertation by Gallamore—(*Ibid.*, pp. 10-11). But even in Mr. Gallamore's view, the savings performance in 5 of the 9 mergers listed was either "good" or "excellent." In two cases it was "fair" and in two cases "poor." Finally, "Western Rail Mergers" itself assumed the existence of the GN-NP-CB&Q consolidation. (*Ibid.*, p. 14, fn. 5).

tral mergers (320 I.C.C. at 154; 389 U.S. at 493) as in the case at bar (App. 128, 262, 263; Exh. 244, p. 2) it was recognized that the full breadth of projected savings would not be reached until five, eight, and five years, respectively, following consummation. Moreover, the savings projected in this merger may well prove to be quite conservative. The estimates were reduced by at least 5% to account for "contingencies" which may never occur. (App. 261). Also the figures do not reflect the impact of inflation and should be even larger today than when calculated in 1967. Of course no particular dollar figure is, or can be, guaranteed. The Commission so recognized here, stating that the exact amount of savings could never be precisely determined, and that some anticipated savings will not be realized, while other unanticipated economies will be produced (App. 304). *Cf.*, *Erie-Lackawanna R. Co.* v. *United States*, 279 F. Supp. 316, 343 (S.D.N.Y., 1967), aff'd *sub nom.*, *Penn-Central Merger Cases*, *supra*. In the last analysis, the question is one for the judgment of the agency, which here thoroughly considered the matter, concluding that the estimates were reasonably accurate, and that substantial savings—of a magnitude approximately that projected—would indeed occur (App. 258-266, 301-305).[31]

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[31] At the further hearings, the Department, which already had full access to the work papers and underlying data of the consultant who offered the savings studies, thoroughly cross-examined this witness, as noted below (App. 39). The Department also introduced some evidence designed to impeach the studies. Notwithstanding this, the Department—in an argu-

Finally, the Department claims that many savings can be achieved without merger (Br., pp. 21, 57). The record, however, contains no support (and the Department cites none) for this sweeping speculation. Indeed, the evidence supports the Commission's conclusion in the Second Report (App. 300): that many of the coordinations put forth as possible without merger "* * * though physically feasible, would produce grossly unequal benefits to GN and NP as separate carriers" and that "* * * competition between the Northern Lines renders it difficult if not impossible, as a practical matter to incur the expense involved in effecting such coordinations." (See Tr., 139, 182-183, 176, 268-269, 283; Exh. 4, p. 17)[32]

The record of American railroads in voluntarily effectuating apparently sensible and economic coordi-

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ment not made in the Jurisdictional Statement—now refers in a footnote to the fact that certain discovery as to rail employment information was denied (Br., p. 58, fn. 45). This matter was fully argued before the Commission and the lower court, both of which resolved the contention adversely to the Department. (App. 39-42, 302-304; Brief of ICC to District Court, pp. 66-73). As the Commission noted, nothing in the circumstances of this case indicated that discovery would have shown anything beyond normal attrition of the labor force. Moreover, the railroads stated by affidavit that the records sought were either non-existent or had been destroyed after passage of the Commission-prescribed record retention period. In any event, changes in the labor force, the essence of the Department's discovery request, were recognized by the merging lines and their witnesses, and were reflected in the evidence showing a revised savings estimate (Exh. 244).

[32] Even in the First Report the savings regarded by the majority as feasible without merger came to only $5.2 million (App. 127-128).

nations is not encouraging. For example, coordinations envisioned as part of the GN-NP unification passed upon by the Commission in 1930 never came to pass. From 1930 to 1933, the Federal Coordinator of Transportation, acting under the Emergency Act of 1933 (48 Stat. 211), was charged with attempting to bring about economies by voluntary coordination. But his efforts were largely unsuccessful. This was because railroad executives, looking after the best interests of their own roads, were wary of any collective action; because of wrangling over labor protection; and because of hostility from the Association of American Railroads. Leonard, *supra*, pp. 230-234 and authorities there cited.

The conclusion that voluntary coordination generally will not work also appears strongly in the legislative background of the present Section 5. The Committee of Six, whose recommendations underlie much of the present law (as we have shown), clearly stated that economy through voluntary coordination was "infeasible." The "fundamental difficulty", in the Committee's view, was that voluntary coordination required competitors to cooperate and yet continue competing—all of this without proper compensation for the road which would voluntarily surrender facilities built up through years of effort and expense. The Committee concluded that consolidation (merger) was by far the better approach since there would be no "surrender of position" but rather "a blending" of the component roads into one company on an equitable basis which would recognize the efforts and contribution of each carrier. *Hearings, Committee on*

Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess. (1939) (H.R. 2531) p. 274. With this background as context, the Commission was plainly within its discretion in rejecting the notion that some savings should not really be counted because they could somehow be achieved short of merger. As the lower court concluded, "We cannot overrule the Commission's final conclusion that coordination on the contemplated scale is physically impossible absent merger" (App. 39).

b. Service Benefits

As noted above, it is unchallenged that this merger will produce many substantial public benefits, wholly apart from the large savings achievable by the roads themselves. These service benefits were detailed in the Second Report (App. 305-310) and were not questioned even by the majority in the First Report (App. 81-84, 161). We here mention only some highlights. For example, as the Commission found in discussing the benefits, the merger will result in "faster trains" (App. 306). This is primarily because the merged company will be able to select the best route from among the components operated by the former independent roads, and at the same time, eliminate the present time-consuming interchanges between roads.

Transcontinental shipments moving from Seattle to the Twin Cities will take a vastly improved new route made up of the best segments of the merging lines (App. 1201; Exh. 4, pp. 129-130, Map VI-A). Between Seattle and Spokane, this traffic will move over the GN route, which is substantially shorter and has a

less severe grade over the Cascade Mountains than the route of NP. From Spokane to Sandpoint, Idaho, goods will travel over the NP line, which is slightly shorter and has more favorable grades than the GN route. Moving eastward from Sandpoint to Casselton, North Dakota, traffic will be routed via GN—a route which is nearly 90 miles shorter than NP, crosses the Rocky Mountain only once instead of twice (as does NP), has more favorable grades, and makes full use of a relatively new GN yard at Minot. From Casselton to the Twin Cities the merged company will utilize the NP route, which is superior to that of GN because it is slightly shorter and consists primarily of double track. After merger, transcontinental trains taking this route on their way to Chicago will arrive in at least 12 hours less time than presently consumed by either road operating independently between the points (App. 306; Exh. 11, pp. 3-4).

Numerous other time savings will occur through merged operation, with the new company taking advantage of available component routes, eliminating existing interchanges and utilizing proposed new facilities (Exh. 4; Tr. 182-185, 273-289, 354-360, 364-377). For example, trains will operate between Seattle and East St. Louis in 20 hours less time over a shorter route (Exh. 4; table VI-A; Exh. 11, pp. 3-4). As the Commission found, fruit and other agricultural products of the Yakima Valley will, after merger, reach Chicago and Kansas City 12 and 24 hours earlier than at present (App. 306). Similarly shipments of perishables from the Wenatchee Valley

will be delivered at Kansas City and Omaha 24 hours earlier than present (Tr. 355).[33]

Earlier and more dependable arrivals are of benefit to the railroads and shippers. To the roads this means facilitation of eastern connections, additional leeway, flexibility in handling of shipments at destination, and easier compliance with local ordinances and practices requiring switching and spotting of cars prior to early morning deadlines (Tr. 359-360, 370-371). For shippers, the merger will enable perishables to arrive in Chicago rapidly and in time for inspection or sale well prior to the 4-6 a.m. market opening time (Tr. 371). Shippers of Northern Tier fruits and vegetables repeatedly testified to the importance of faster transportation of perishables, explaining that the time savings achievable through merger would help minimize deterioration, assure better quality goods for the consumer, and get better prices for the grower (e.g. Tr. 5033, 5665-5666, 5717, 7561). The record contains abundant evidence showing the significance of the transit time factor to shippers of other commodities as well.

Additionally, the merged company will be able to offer virtually all routes and combinations of routes

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[33] Certain faster trains already introduced by Northern Lines do not, as the Department claims (Br., pp. 14, 59), detract from what can be done by merger. As the Commission explained, these particular trains were short, light-tonnage trains pulled by high horsepower locomotives; as such they have nothing to do with the improvements which the merger makes possible for ordinary freights (App. 467-468). Indeed even the short, light trains should perform substantially better with the advantages of the merged system.

presently available separately on the roads which will make up the system (Tr. 451, 2677). This will create important benefits for countless shippers. At present each road makes available certain privileges which allow shippers to stop goods en route for various purposes—processing, fabrication, mixture, partial storage, partial loading, or unloading. The privilege enables the shipment to move at cheaper through rates, even though it was stopped en route. But each railroad, to protect the long haul, allows those privileges only at points on its own road (Tr. 449-450). After merger, there will be one company with the privileges available throughout the system (Tr. 449-462).

For example, a Washington lumber plant served by GN desires to mill lumber in transit at Missoula, Montana. But because Missoula is served by NP, the transit privileges offered by GN—which originates the shipments from the Washington plant—made it practically impossible for the lumber company to mill at Missoula, and had actually caused loss of business (Tr. 7393). Under unified operation, the original plant and Missoula will be on the same system, and the transit privilege will cover the shipment. Similarly the merger will expand sources of supply. The current limitation of privileges to the one railroad causes a Libby, Montana, lumber mill, served only by GN, to purchase at points served by that railroad. Only in this way can the processed material move from origin to destination by cheaper rates (Tr. 452-453). After merger, the same mill can acquire plywood or lumber from any point served by the entire

company. Similar considerations apply to the storage of grain and the fabrication of steel (Tr. 3663-3664, 17111).

As illustrative of the expanded "stop off" privileges, a large shipper of fruit served by GN at Wenatchee, Washington, cannot presently stop a Minneapolis-bound car for partial unloading at Bismarck, served only by NP, and cannot compete for business done at or through the intermediate point (Tr. 7312-7313). After merger, however, shipments originating at Wenatchee and destined for Minneapolis can, of course, be stopped for partial unloading at Bismarck. This benefit was of great importance to shippers of commodities sold in smaller quantities, such as school supplies, grocery items, or even childrens' toys (Tr. 3829, 8023-8025, 13170-13171).

Next, as the Commission found (App. 309), the merger should help to alleviate recurring car shortages which plague shippers from time to time. First, competition between the roads will no longer cause one to retain cars for its own purposes while the other is shorthanded; after merger, one management can channel the cars to needed areas (App. 309; Tr. 575; Exh. 240, p. 3). Second, all of the factors creating faster service—use of shortest and best routes, elimination of interchange delays, etc.—will free more cars sooner (Tr. 593-594). Finally, more cars will be available because the merging roads will be one railroad and thus—as to each other—will to some extent be free of car distribution restrictions imposed by the Association of American Railroads upon

"home" and "foreign" roads (Tr. 588-593; App. 309).

3. *The Instant Case is Wholly Analogous to the Seaboard-Coast Line Merger.*

a. Similarities

The present transaction so closely resembles the Seaboard-Coast Line merger in many crucial aspects that the action of the three-judge court and of this Court, in sustaining that merger, should be dispositive here. *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line R. Co.*, 320 I.C.C. 122 (1963), sustained *sub nom.*, *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993 (M.D. Fla., 1966), aff'd *per curiam*, 386 U.S. 544 (1967). As we have already shown (*supra*, pp. 43-44) one of the Department's fundamental contentions, that economies and transportation benefits do not justify consolidation of healthy competitors, was there rejected (259 F. Supp. at 1012-1013). But the similarities go well beyond the Department's attempt to reargue the same theory.

In *Seaboard*, as in the instant case, it was found that the merger would produce what the Department here calls "conventional" benefits. These included substantial economies (at least $20 million in annual savings), and benefits such as improved schedules and routes, elimination of interchange delays, increased transit and stop-off privileges, and better car supply (259 F. Supp. at 1009; 320 I.C.C. at 159, 160-161). Both mergers, of course, involve some anticom-

petitive consequences; but these are certainly no more severe (and possibly even less so) in the instant case than in *Seaboard-Coast Line*, which was sustained though it involved "a head-on collision" with the antitrust laws (259 F. Supp. at 996). In *Seaboard* the merger produced a rail monopoly at Tampa, as well as in other parts of Florida, and at 17 communities (averaging 6500 persons each) in other states (242 F. Supp. at 22; 259 F. Supp. at 1004; 320 I.C.C. at 164). In *Seaboard* there was a resulting monopoly over 15% of the total population of a six-state area (320 I.C.C. at 164). But in the instant case, the total population of the communities which will be left without competitive rail service by the Northern Lines merger is substantially less than that of Tampa alone (*supra*, pp. 46-47), and is less than 1% of the total 1960 Northern Tier population.

The merged Seaboard-Coast Line controls 81% of the total railway mileage in Florida (242 F. Supp. at 17); the Northern Lines will control smaller shares in each of the Northern Tier states: 39% in Minnesota; 64% in Washington; and 67% in North Dakota and Montana (App. 146). And the percentages for North Dakota and Montana are mitigated by the fact that there the lines are widely separated and often not competitive. In the instant case, even accepting the statistics relied upon by the Department, rail competition would be entirely eliminated on 5.6% of the merging lines' Northern Tier tonnage (App. 316). The comparable figure in *Seaboard-Coast Line* as to system-wide traffic was 13.7% (320 I.C.C. at 164). Moreover in *Seaboard-Coast Line* the Commission

found that 33% of the applicant's total tonnage was competitive. In the present case, the comparable figure, again accepting the statistics *arguendo*, is at most 22% (App. 316). Finally in *Seaboard-Coast Line*, the merging lines had "impressive" earnings records and a rate of return above the average for Class I railroads (320 I.C.C. at 149). In the instant case, the 1965 and 1966 rates of return for the merging lines were below the Class I railroad average (App. 299). On any view, therefore, *Seaboard* clearly shows that a rail merger may be consistent with the public interest though the lines compete with each other and are not financially weak.

b. The Department's Suggested Distinctions

The Department attempts to distinguish *Seaboard-Coast Line* in part on the ground that intermodal competition was somehow more significant there (Br., p. 21)—apparently on the theory that the forest, agricultural, and mineral products which dominate the Northern Lines' traffic are dependent upon the rails (Br., pp. 45-46). But, as the court recognized in *Seaboard Coast Line*, "* * * nine bulk commodities handled by [the merging lines] account for approximately 75-77 percent of their business" and "* * * railroads enjoy a decided economic advantage over all other modes of transport on heavy, long, bulk-haul products in central and western Florida" (259 F. Supp. at 1004, 1005). Both the Commission and the court there recognized that phosphate rock, one of the major commodities originating in the territory where the loss of competition was strongest, was

"essentially" railroad traffic (320 I.C.C. at 151; 259 F. Supp. at 1005). And the district court stated, with reference to the bulk commodities produced in the Florida monopoly areas, that the record did not show "that effective competition for this type of carriage presently exists in Florida" (259 F. Supp. at 1006, fn. 30).

The Department further argues that *Seaboard-Coast Line* is different because the Northern Lines' only Northern Tier rail competition comes from the allegedly weak Milwaukee, as compared with the Southern in *Seaboard* (Br., pp. 21, 29, fn. 16). The distinction is without merit for several reasons.

The Southern Railway does not even operate in the portions of Florida where the anticompetitive consequences of that merger were strongest. As the Commission stated: "The situation at Tampa and in the central and western portions of Florida is unique in that these areas are served by no other railroad except Seaboard and Coast Line" (320 I.C.C. at 164). In its *Seaboard-Coast Line* district court brief, the Department stated that Southern would be the major competitor for so much of the merged company's traffic as was subject to competition, but argued that:

> "* * * most of the Seaboard-Coast Line revenues would be derived from traffic for which there are no rail alternatives—on which it will have a rail monopoly. But even if Southern competed for all or most of the traffic carried by the merged company, the reduction of major or rail competitors from three to two has a normal tendency to lessen competition." (p. 31).

Second, Milwaukee is not the "only" Northern Tier competitor, as the Department claims (Br., p. 21). UP, as we have shown, serves several important points, and as shown by the statistics upon which the Department relies as measures of the east-west market (Br., pp. 38, 42), UP has generally carried upwards of 27% of that traffic (App. 146). In addition the Department overlooks the Soo Line-Canadian Pacific, the North Western, and the routes of both WP and SP.

Third, the Milwaukee, though certainly not as profitable as the Northern Lines, has nonetheless provided meaningful competition—even under its present handicaps. As the Commission found in the First Report (App. 107-108):

> The record clearly shows that the Milwaukee now provides an essential and efficient rail transportation service in the area where it is a principal competitor of the applicant railroads. Evidence to that effect was adduced by the testimony of 6 of Milwaukee's officials, 1 consultant, public witnesses called by it, at least 86 of the shipper witnesses called by applicants, 18 independent interveners representing various Federal and State agencies, and by a number of associations of shippers. We agree with the following summary of this evidence by the examiner:
>
> > In spite of wide divergence of position expressed on the proposed unification, each of the intervening Federal and most State agencies, as well as numerous important shippers, whose shipments approximate

> many thousands of carloads annually, called by both applicants and interveners, forcibly evidenced the vital importance of and dependence upon the Milwaukee both at points competitive with one or more applicant railroads, and at stations and areas noncompetitive with applicant railroads. They look to the Milwaukee for active, vigorous and healthy railroad competition both in rate negotiations and in quality of service to the shipping public.

Moreover the Department apparently ignores the unique conditions here imposed for Milwaukee's benefit (*supra*, pp. 83-87). In the First Report the Commission recognized that conditions even less sweeping than those finally imposed "would make the Milwaukee a stronger carrier after merger than it is today" (App. 119). In the Second Report, as noted *supra*, at p. 88, the Commission viewed the conditions as substantially strengthening Milwaukee and greatly enhancing its competitive posture. Moreover in *Seaboard* the Commission declined to impose conditions which would have given Southern a line from Jacksonville to Tampa (320 I.C.C. at 186-187). But in the instant case, Milwaukee obtained gateways and access to several important areas where it will provide new competition. For this reason as well, the Northern Lines merger, as conditioned, may be even less anticompetitive than *Seaboard*.

II.

The Stock Exchange Ratio Was Properly Found to Be Just and Reasonable.

Under the terms of exchange, stockholders of GN and NP will each receive one share of common stock in the new company for each share of common stock they presently hold. Each road has approximately the same number of stockholders. In addition, each GN stockholder will receive a temporary advantage—½ share of $10 par value 5½% non-voting preferred stock. The preferred stock is redeemable, at the new company's option, on the fifth anniversary of the merger, and must in any event be retired within a 25-year period thereafter.

These terms were the product of years of hard bargaining, during which the NP natural resource properties were fully considered, and were indeed the major subject of debate and negotiation. The final terms, approved by the respective financial advisors and the stockholders, represent a reasonable compromise between the demands of both sides. The terms, for a temporary period, reflect GN's long-time superiority, while recognizing that NP stockholders, due to ownership of substantial natural resource properties are entitled to equal participation in the new company over the long run.

A. *The Value of the Natural Resources is Fairly Reflected in the Exchange.*

1. *The Negotiations*

At the outset of negotiations, years before the applications were filed with the Commission, the par-

ties recognized that problems arising out of NP's natural resource properties would be "a major difficulty" in arriving at merger terms (Tr. 89, 1417). In 1957 and 1958 GN and NP employed separate financial consultants for advice as to terms. GN employed the First Boston Corporation and NP employed Morgan Stanley & Co. Each road also retained independent firms to evaluate various aspects of the NP natural resources. (Tr. 89-90, 92-94). NP further made its own evaluation of certain property, and its advisor, Morgan Stanley, made an overall evaluation of the properties (Tr. 94, 95, 324-325). The several evaluations—all utilizing varying methods of appraisal and producing a wide range of figures—were made available to the negotiators as well as to the independent advisors.

For some time thereafter, the Northern Lines were unable to reconcile their differences as to terms. They were $50 to $60 million apart in valuing the relative rail operations (Tr. 95, 98, 1004). Believing that those differences might be resolved separately, the parties explored methods of segregating the natural resource properties so as to negotiate on the basis of rail properties alone. Various "segregation" alternatives were discussed and rejected (Tr. 97-98, 1169-1174, Exh. 215, pp. 1-7). The rejection of the appellant Committee's proposal for a pre-merger sale for the benefit of those wishing to buy in will be discussed *infra*.

When it was determined that segregation was not feasible and that the NP properties would be included in the merger, the parties were again at odds. Each

held out for better terms than those ultimately agreed upon. GN, relying on its superiority through the years, was insisting that its stockholders receive 1.2 or 1.5 shares in the new company for each share issued to a NP stockholder (Tr. 97, 2469, 2591). NP, on the other hand, following the advice of Morgan Stanley, demanded a share-for-share exchange (Tr. 96, 100, 322, 325). This impasse continued until the negotiations virtually broke down in October of 1959 (Tr. 100, 1175).

Eventually the course of the negotiations made it apparent that "some concession would have to be made on each side" if there was to be a merger at all (Tr. 100). After re-examining the matter, NP's negotiators—in accord with advice from Morgan Stanley—determined that the benefits and strengths achieved through merger warranted some recession from the share-for-share demand (Tr. 100, 326, 2426, 2469-2470). Similarly, GN modified its insistence upon an advantage in common stock distribution. Agreement was finally reached in 1960, when Morgan Stanley suggested the limited preferred stock "as a method of bringing together the gap in our negotiation between the Great Northern and Northern Pacific and ending up share-for-share on the common stock" (Tr. 2478).

The negotiations were properly accorded weight as the product of arms-length bargaining. While the Commission must, as here, make its own decision as to terms, still such negotiations constitute important evidence of fairness and should not be ignored. See *Penn-Central Merger Cases*, 389 U.S. 486, 523 (1968).

As we have shown, the discussions at bar dragged on for several years with each side insisting upon particular treatment. The differences were so strong that the negotiations virtually broke down at one point in 1959. NP, as noted, was guided by Morgan Stanley, an independent financial advisor with substantial experience in the area and with no axe to grind.

Mr. MacFarlane, NP's chief negotiator,[34] testified that throughout the negotiations he sought to obtain the best possible terms for NP stockholders utilizing the highest possible evaluations to reflect the strongest positions (Tr. 1027, 1167). The bona fides of the negotiations can be seen from the fact that the NP negotiating team itself was once at odds over the treatment of the natural resources, and rejected a proposal for their separate reflection only after intensive discussion and debate (Tr. 1169-1174). Moreover, Mr. MacFarlane himself was and is a substantial NP stockholder, with every motivation to press for the best possible terms.[35]

The decision made by both sides was clearly within the realm of responsible management decision. That the choice was made does not, as the appellant Com-

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[34] At the time of the negotiations, Mr. MacFarlane was NP's president. He subsequently served as Chairman of the Board and later retired.

[35] His personal holdings increased from over 7,000 shares in 1961 to over 11,000 shares in 1968 (Exh. 26, p. 21; Rail Form A, Annual Report, 1968). This stock has current market value of over $500,000—nearly eight times as large as the holdings of the Chairman of the appellant Committee (Committee Proxy Statement, March 1, 1968).

mittee suggests, establish any absence of bona fide bargaining. Compromise is the essence of negotiation. See *Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523, 636 (1943), recognizing that "compromise, settlements, and concessions are a normal part of the reorganization process" in determining whether a plan is "fair and equitable"—a test analogous to that applicable to merger terms. *Schwabacher* v. *United States*, 334 U.S. 182, 199 (1948). It was obvious that insistence upon the demands of both sides would have terminated the efforts to reach agreement. Confronted with huge savings achievable through merger and unquestioned strength which the transaction would bring to the two companies, it was only reasonable for the negotiators to recede from their demands and reach agreement. In short, as the Morgan Stanley witness explained:

> Well, this was a continuous process of study and negotiation, as I have indicated. You remember that we started with our recommendation of the share-for-share exchange between the two railroads, with the Great Northern feeling equally strongly that they were entitled to a 20 per cent premium, a share for Northern Pacific, a share and a fifth to Great Northern, and it was in that area that we negotiated it out and our attempt as I have indicated here was to develop a merger plan which would be acceptable to both railroads and which would preserve on a long-term basis the share-for-share interest in the common stock that we had originally recommended so that both groups of stockholders would share equally in the ups and downs of the business, and

> I think as our study and negotiations developed we became convinced that the modest cost that was involved to the Northern Pacific in this issue of preferred stock was far more than offset by the advantages to the Northern Pacific stockholders of the merger as we saw it. (Tr. 2469-2470).

That no specific dollar value was necessarily assigned to the NP natural resource properties does not establish any unfairness. There is no rule requiring that dollar values be assigned to all assets. Indeed such a requirement might well thwart any negotiations at their outset. *Cf., Group of Investors, supra,* 318 U.S. at 561 and 565 where, even as to essentially rail properties, it was said:

> The contribution which each division makes to a system is not a mere matter of arithmetical computation. It involves an appraisal of many factors and the exercise of an informed judgment. Furthermore, an attempt to put precise dollar values on separate divisions on one operating unit would be quite illusory. * * *
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> * * * *
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> We recently stated in another connection that, whatever may be "the pretenses of exactitude" in determining a dollar valuation for a railroad property, "to claim for it 'scientific' validity, is to employ the term in its loosest sense." *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U.S. 362, 370. That is equally true here. A requirement that dollar values be placed on what each security holder surrenders and on what he receives would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process. * * *

Similar considerations entered into the negotiations at bar. As Mr. MacFarlane explained:

> Now, when you get all through, Mr. Dailey, it is a judgment figure and you can't put a precise tag on each separate item and add it up and say this is it, because that wasn't the way it was done and I don't do it that way (Tr. 1167).

The negotiations were best summarized by the Morgan Stanley witness, a man with 30 years' experience in the study of railroad finances and evaluation of railroad securities:

> I wouldn't think it was a question of Northern Pacific weakening. I think in working out any merger there has to be a certain amount of give and take. As you well know, this is not an exact science and you can't say precisely share-for-share is correct and a little bit one way or another is wrong. There has to be a certain amount of flexibility and give and take and that was our approach in working out these terms (Tr. 2472).

2. *The Exchange Ratio*

All Northern Lines' properties, rail and non-rail, were valued on the basis of earnings, with more weight accorded to the natural resource earnings than to the rail earnings. In reaching an opinion as to the exchange ratio, each advisor recognized that the earnings of the NP natural resource properties had potential for significant increase. In working out the terms so as to ultimately allow NP stockholders an equal share in the new company, Morgan Stanley particularly considered the likelihood that the natural resource earnings would improve and become increas-

ingly important over the long run (Tr. 326, 2399, 2452-2453, 2479). Similarly, First Boston weighed the natural resource earnings at 1½ times those of rail earnings for the very purpose of reflecting future development and increased earnings from those NP properties (Tr. 2570, 2574-2575, 2600-2601).

The use of earnings as a basis of valuation in determining the financial terms of a rail consolidation has frequently been recognized as proper. *E.g.*, *Penn-Central Merger Cases*, 389 U.S. 486, 523-526 (1968), affirming *Erie-Lackawanna R. Co.* v. *United States*, 279 F. Supp. 316, 339-347 (S.D.N.Y., 1967) (terms for inclusion of certain roads in N&W system); *Fried* v. *United States*, 212 F. Supp. 886, 891-892 (S.D.N.Y., 1963) (terms for merger of Delaware, Lackawanna and Western R. Co. and Erie R. Co.); *Stott* v. *United States*, 166 F. Supp. 851, 857-858 (S.D.N.Y., 1958) (terms for merger of Nashville, Chattanooga & St. Louis into Louisville & Nashville R. Co.); *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 190-193 (1963); *Norfolk and Western Ry. Co. and N.Y., C. & St. L. R. Co. Merger*, 324 I.C.C. 1, 80-82 (1964) (terms for the "Nickel Plate" merger); *Norfolk and Western Ry. Co. Merger*, 307 I.C.C. 401, 429-430 (1959) (terms for merger of The Virginian Ry. Co. into N&W).

The key to the fairness of the ratio lies in the combination of common and preferred stock. As noted, the preferred stock is not a permanent issue but will be called or retired within 5 to 25 years of consummation. When that is done, NP stockholders will share on a one-for-one basis in the new company.

The NP stockholders are thus assured equal participation in the merged company even if the potential benefits of the natural resources are never realized.

That NP and GN stockholders will achieve parity itself clearly shows reflection of the natural resource properties in the exchange. Considering comparative performance and relative strength of the two companies through the years, there would hardly be justification for such eventual equal participation in ownership but for the natural resources.

Morgan Stanley, NP's own advisor, concluded that a proper ratio between the companies was 60% for GN and 40% for NP, when the Northern Lines were viewed as railroads only (Tr. 95). GN's transcontinental route is superior to that of NP, involving less distance, lower grades, less curvature, fewer crew changes, lower operating ratios, and faster time (Tr. 120-121).[36] Measured by the ratio of operating expenses to operating revenues, GN unquestionably has the better record. For the years 1958-1960, while the negotiations were going on, GN's average operating ratio was 77.02, compared with 81.4 for NP. For 1966-1968 the average operating ratios were 79.05 for GN and 83.89 for NP. GN is the larger company, owning more freight cars, operating over more miles of roads, and carrying a greater amount of revenue freight—some 13 million tons more than NP in the year 1968 alone.

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[36] NP's poorer route will be an even greater handicap in the future because a new interstate highway between the Twin Cities and the Puget Sound area will serve NP main line cities over a distance shorter by 241 miles (Tr. 121).

GN is superior in the critical area of debt structure. As of 1968, GN reported $9.6 million due within one year, as against $15 million for NP. For long-term debt due after one year, GN reported $256.5 million in 1968, as against $288.7 million for NP. GN has overall superiority in net income from rail operations, though the situation has changed during the last two years. GN's average net income for the years 1951-1968 is $27.2 million, compared with $21 million for NP. For the years 1964-1968, the average net incomes from rail operations were $28.7 million for GN and $26.2 million for NP.

As shown by the following tables, GN stockholders have benefitted from generally higher earnings per share and dividends declared.

EARNINGS PER SHARE COMMON STOCK

Year	GN	NP
1951	$3.91	$2.68
1952	4.55	2.66
1953	4.92	2.61
1954	4.21	2.41
1955	5.27	3.22
1956	5.32	3.52
1957	4.38	3.54
1958	4.52	3.68
1959	4.35	3.97
1960	3.41	3.10
1961	3.07	2.72
1962	4.12	3.39
1963	4.80	4.09
1964	4.71	3.90
1965	6.01	4.65
1966	5.94	5.08
1967	3.14	3.90
1968	3.54	4.20

DIVIDENDS DECLARED

Year	GN	NP
1951	$2.00	$1.25
1952	2.00	1.50
1953	2.00	1.50
1954	2.10	1.50
1955	2.35	1.58
1956	2.63	1.50
1957	3.00	1.63
1958	3.00	1.67
1959	3.00	2.00
1960	3.00	2.20
1961 [37]	3.00	2.20
1962	3.00	2.20
1963	3.00	2.35
1964	3.00	2.50
1965	3.00	2.50
1966	3.00	2.60
1967	3.00	2.60
1968	3.00	2.60

Similarly, GN stock has traded higher than NP through the years. The mean market prices for a share of the stock of each road were as follows for the years 1961-1968: [38]

[37] The merger agreement of 1961 requires that GN and NP not issue annual dividends in excess of $3 and $2.60 per share. respectively (Application, Exh. 7a, pp. 3-4), GN had paid such a dividend since 1957; NP did not reach that maximum until 1966.

[38] Source: Commercial and Financial Chronicle.

Year	GN	NP	GN Superiority
1961	$45.50	$44.94	$ .56
1962	41.13	37.38	3.75
1963	50.56	45.44	5.12
1964	61.44	54.19	7.25
1965	56.50	52.00	4.50
1966	62.63	54.50	8.13
1967	60.75	56.94	3.81
1968	57.19	55.44	1.75

The fact that the trading pattern during the first four months of 1969 may have reflected a slight advantage for NP (Stockholders' Br., pp. 42-43) establishes neither the invalidity of a ratio based upon the long-term range, nor need for further hearings.

Finally, the half share of preferred stock to be received by each GN stockholder is not the overwhelming advantage suggested by the appellant. Measured by par value, the preferred amounts to merely some 1.2% of the total capitalization of the new company (Tr. 2451, 2484-2485). Issuance of the preferred, as distinguished from an outright share-for-share exchange, will reduce the earnings of a common stockholder in the new company by only 14 cents per share (Tr. 2485). Nor will the preferred be a particularly attractive investment from the viewpoint of income. Many investments today can easily return more than the 5½% promised by the preferred.[39] For the same reason the preferred may well trade at prices below face value at issuance. Conversely should interest

[39] As of May of 1969, certain U.S. Treasury Bonds return more than 6%. Investments in sound municipal bonds, with concurrent tax advantages, would obviously be as attractive as the 5½% preferred.

rates decline so as to make the preferred a better investment, the new company would then be motivated to retire it sooner, thereby terminating the 5½% payments. Moreover, the merged company will be owned about half and half by the stockholders of the former GN and NP. Thus about half the dividends paid on the preferred, and half the sinking fund payments made for its retirement, will come from the pockets of GN stockholders themselves. Finally the preferred has no vote, and GN stockholders will thus have no more voice in the new company's affairs than NP stockholders.

In the last analysis, the appellant Committee simply seeks to substitute its judgment for that of the Commission—not to mention the respective negotiators, boards, financial advisors, stockholders, and the court below. The courts have traditionally accorded great deference to the Commission's exercise of discretion in determining the fairness of rail merger terms, even when "factors of particularized judgment and the weight to be ascribed to various values" raise questions as to which "* * * reasonable men may reasonably differ in detail, * * *." *Penn-Central Merger Cases*, 389 U.S. 486, 524 (1968). If a reviewing court finds the agency's "conclusions to be equitable and rational" it should not "second-guess each step in the Commission's process of deliberation." *Penn-Central Merger Cases, supra.* To the same effect see *Friedman* v. *United States*, 168 F. Supp. 815, 818 (S.D.N.Y., 1968), aff'd *per curiam*, 359 U.S. 205; *Stott* v. *United States*, 166 F. Supp. 851 (S.D.N.Y., 1958); *Fried* v. *United States*, 212

F. Supp. 886, 889 (S.D.NY., 1963). There is no reason for any different approach here.

B. *The Appellant Committee's Case, Rejected by the Commission and the NP Stockholders Themselves, did not Establish Unfairness as a Matter of Law.*

The appellant Committee represents "only 3 percent of Northern Pacific's stockholders holding about 5 percent of the stock * * *" (App. 43). The Committee members are partners in an investment counsel firm whose clients, in turn, own about half of the stock represented (Tr. 9886, 9888, 9937). Though the Committee members own only about 3000 NP shares, their firm had for many years recommended that its clients purchase and retain NP stock for investment. (Committee Proxy Statement, March 1, 1968). The Committee is thus a small group, whose members may be regarded as simply seeking to enhance the wisdom of their own advice.

The first attack upon the terms came at the annual stockholders meeting in April of 1961 when a Committee member (a partner in the investment firm) and counsel attempted to block stockholder approval (Tr. 9905; Exh. 145, Part H). This effort failed and the merger terms were approved, with 73.81% voting for, 6.64% voting against, and the remainder not voting. The appellant Committee was then formally organized and participated thereafter in the Commission proceedings.

For the next six years the Committee had full opportunity not only to oppose the terms before the Commission, but also to argue to stockholders and solicit support. In March of 1968, following I.C.C.

approval of the merger with numerous conditions, the matter again came before NP stockholders at an annual meeting. This time the Committee waged a vigorous solicitation campaign, submitting a lengthy letter—which argued that the terms were unfair because of NP natural resources—a proxy statement, requisite forms, and envelopes with postage prepaid. In addition, the Committee represented that solicitations might be made by telephone, telegraph, and personal interview. Despite all of this, the appellant's arguments attracted no substantial additional support. The stockholders again approved the terms, with 73.2% voting for, 2.57% against, and the remainder not voting.[40]

These votes were properly noted by the Commission (App. 292, 465, 471) as a factor tending to corroborate the fairness of the exchange. This is especially so in the context of a strong solicitation campaign. NP stock is widely held, with 30,425 stockholders owning some 6 million shares (Annual Report, Rail Form A, 1968). While 30 large stockholders own about 1.875 million shares, the real voting power obviously lies with over 30,000 stockholders owning the remaining 4.125 million shares. Considering the fact that about 4.4 million shares were voted in favor of the merger terms, it is clear that the Committee, which represented only 869 stockholders, failed to convince any significant number of stockholders as

[40] There is no basis for an inference that those not voting were really opposed to the terms and agreed with the appellant Committee. There is simply no way of ascertaining the reasoning of such stockholders.

to the soundness of its arguments. The thousands of other stockholders are no different than those represented by the Committee—they all own NP stock and have the same stake in obtaining just and reasonable merger terms. The bulk of the NP stockholders could not have so drastically misjudged their own interest. The stockholders' repudiation of the Committee's position is a telling answer to its arguments.

Nor did Committee's witnesses before the Commission by any means "establish" that the railroads had failed to give appropriate weight to NP's natural resources. The most extensive testimony on behalf of the Committee was presented by Mr. Williams, a securities analyst, who sought to determine an asset value for the natural resources solely on a basis of comparison with securities of particular companies. Mr. Williams admitted that he had no experience whatsoever in valuing timber land, agricultural land, oil or gas property, coal properties, or similar assets (Tr. 10003-10004). Moreover, the witness lacked knowledge as to the number of producing fields involved and the amount of proved reserves, for either NP or the companies selected by him for comparison (Tr. 10005-10011). Additionally, Williams' computations produced a valuation for the natural resources alone of $295 million—some $50 million *more* than the then current total stock market value for all NP properties, rail and non-rail (Tr. 10001, 10019-10020). Adding the value of rail properties, Williams stated that the total value of all NP assets should produce a stock market value of $80 per share for NP (Tr. 10023). Yet this figure far exceeds any

recent NP trading price. While stock market trading prices are not infallible guides, the Williams' projections at least cast serious doubt on the accuracy of the witnesses' valuations. Testimony of the witness Story (Exhs. 146 and 147), as to general economic trends and the likelihood of continued inflation, did not constitute "proof" that insufficient weight was given to the natural resources in negotiating the stock exchange ratio.

Mr. Brundage's testimony consisted largely of a criticism of the various valuations made during the course of the negotiations—ignoring the fact that the stock exchange ratio was ultimately a matter of judgment in which such valuations were only one of several factors taken into consideration. Moreover, Mr. Brundage admitted (Tr. 9925) that the natural resources "defy anything approaching an exact appraisal", and his ultimate conclusion that NP should be favored by a stock exchange ratio of at least 1.5 to 1 was itself supported by no definite figures. Rather, that conclusion in substance represented nothing more than a disagreement of judgment with the NP and GN management, which the Commission properly weighed in passing upon the fairness of the merger terms.[41]

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[41] Mr. Brundage's real interest was not in obtaining a revision of the merger terms. He candidly admitted that the Committee "was not organized for the primary purpose of obtaining a change in stock ratios more favorable to Northern Pacific stockholders but instead to enable the Northern Pacific stockholders to retain their present exclusive ownership of the natural resources properties of Northern Pacific" (Tr. 9924).

Testimony of an oil geologist, presented for the purpose of establishing that NP natural resources are likely to contain vast deposits of untapped minerals resulting in enormous future income, wholly failed in its purpose. The witness admitted that he made no independent study of NP's oil reserves, but had merely studied the reports of the various consultants retained by NP and GN, after spending about one-half day with the head of NP's oil development department (Tr. 10072).

In sum, the evidence presented by the Committee was speculative and in no way established any unreasonableness or unfairness in the negotiators' treatment of the NP natural resources. The record clearly establishes that the full potential value of the natural resources was considered by NP and GN in their negotiations, and the Commission was justified in concluding that the agreed stock exchange ratios were just and reasonable.

C. *There is no Requirement That the Natural Resources Properties be Segregated and Sold Prior to the Merger.*

The Committee's final suggestion is that the natural resources properties should be eliminated from the merger altogether, by the device of segregating the properties and offering them for sale to existing NP stockholders. The Commission properly found that the Committee's proposal is "no real answer" (App. 297) to the problem.

The possibility of segregating the natural resources and negotiating the merger on the basis of the railroad properties alone was considered by NP manage-

ment during the course of negotiations (Tr. 97-98), and rejected because of the practical problems involved. At the present time, the natural resources properties are subject to a Prior Lien Mortgage and a General Lien Mortgage. Because of the tax consequences, a spin-off subject to the mortgages would not be practical or desirable (Tr. 98).[42] And a spin-off free of the mortgages could not be accomplished in view of the position of the mortgage Trustees: that they could not lawfully approve a release of the lands as a whole without a decree of a court, in an adversary proceeding, with appeals to a higher court in the event of a lower court decision adverse to the Trustees' position (Exh. 220, pp. 1-2; Exh. 221, pp. 5-6).

The Committee concedes (Tr. 9946) that a spin-off is impractical. Yet their proposal for a segregation and sale prior to merger is subject to exactly the same defects—*i.e.*, it could not be accomplished without litigation because of the position of the Trustees, and it would result in a capital gains tax to NP of around $21 million (Exh. 215, p. 3).

In addition, the Committee's proposal would be unfair to the present NP stockholders. As previously noted, the Committee's suggestion would involve the *sale* of the stock in the new land company to the

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[42] Under Sections 351, 355, and 357 of the Internal Revenue Code, a transfer subject to the mortgage would not be a tax-free transaction, and NP would be subject to capital gains tax to the extent that the assumption of liability exceeds NP's basis in the property—which, since these are land-grant lands, would result in a substantial tax liability.

present NP stockholders. Any stockholder who is unable to purchase the additional shares would be frozen out of further participation in the income from the natural resources—a benefit he now owns by virtue of his NP stock.[43]

The Committee's suggestion that any NP stockholder could acquire the cash to purchase stock in the new land company by selling some of his NP stock is in no way a satisfactory solution. Any such sale would subject the individual stockholder to capital gains tax—which might amount to a sizeable sum, depending upon the price at which he purchased his NP stock. For every $100 of NP stock sold, a stockholder would thus be able to buy substantially *less* than $100 of stock in the proposed new land company.

In short, there are numerous deficiencies in the Committee's proposal, and the Commission was well within its discretion in concluding that no such treatment of the natural resources properties is required by fairness or equity.

D. *The Commission's Denial of Requests for Further Hearings as to Terms was well within its Discretion.*

The Committee seeks further hearings to "update" the record with various developments allegedly bearing upon the fairness of the terms. But none of the

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[43] Moreover, to the extent that present NP stockholders chose not to buy stock in the new land company, the stock would be sold by underwriters to other persons and the Committee's entire concept of preserving the natural resources for the "exclusive" benefit of present NP stockholders would be lost.

arguments is of such magnitude as to render the merger terms unfair or inequitable as a matter of law. To be sure, the record is several years old. Yet that circumstance does not require further hearings as to terms. Indeed, as noted, the terms were approved by NP stockholders—as against the very arguments now urged before this Court—as recently as March of 1968. The Committee's "new developments" are but normal fluctuations which might well occur during the course of any protracted administrative proceeding, and have no effect on the ultimate fairness of the Commission's decision.

It is axiomatic "that rehearings before administrative bodies are addressed to their own discretion" and "[o]nly a showing of the clearest abuse of discretion could sustain an exception to that rule", *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535 (1946); accord: *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-515 (1944); *United States* v. *Northern Pacific Ry.*, 288 U.S. 490, 494 (1933). Reliance upon *Atchison, T. & S.F. Ry.* v. *United States*, 284 U.S. 248 (1931) is misplaced. This Court "promptly restricted that decision to its special facts * * * and it stands virtually alone." *Interstate Commerce Commission* v. *Jersey City*, *supra*, 322 U.S. 503, 515. The situation there presented—where the Great Depression completely undercut the evidence of financial condition of the railroads presented in a 1928 hearing—is in no way comparable.

Major rail merger cases are necessarily time consuming with several years inevitably expiring be-

tween the original application and final decision and consummation. For example, hearings on the Seaboard-Coast Line merger occurred in 1960; yet the merger was not finally consummated until 1967. Penn-Central merger hearings were held in 1962, but the merger was not consummated until 1968. These time periods are simply inherent in large rail mergers, due to their factual complexity and often controversial nature. If these gaps are held to require continual "updating" for further hearings and endless resubmission of terms to stockholders, then it is conceivable that nothing could ever be accomplished. This was recognized in the Penn-Central litigation. See *Erie-Lackawanna R. Co.* v. *United States*, 279 F. Supp. 316, 340 (S.D.N.Y., 1967), aff'd *sub nom.*, *Penn-Central Merger Cases*, 389 U.S. 486, where it was urged that certain 1966 earnings should be used in lieu of 1965 figures because the later results were (by then) available. As the court (Friendly, J.) there stated:

> The hearing examiner and the Commission having properly used 1965 figures, they were not required to start anew when the 1966 figures . . . became a part of the record. . . . These are simply raw figures which have not been analyzed to remove extraordinary items or to place others on a full year basis; by the time the experts could do that and the Commission could render a new report, 1967 figures would be available and, on N & W's argument, the process must start again. The law does not compel an infinite regress.

What this Court said in *Jersey City, supra,* 322 U.S. at 514-515 is entirely applicable here:

> Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body.

The decision in *Schwabacher* v. *United States,* 334 U.S. 182 (1948) does not require up-to-the-minute valuations as a condition precedent to the validity of a rail merger. To be sure, it was there said that

> In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs * * *. (334 U.S. at 199).

The reference to "current worth" cannot be divorced from its context, which dealt with claims arising out of a corporate charter drafted years earlier. The case should not be read as requiring "updating" hearings in the circumstances at bar. In any event, as we show, the "current worth" of the NP stockholder's contribution to the merger is not materially different from what it was at the time of the hearings, or in March of 1968 when the stockholders again approved the terms.

The Commission here acted well within its discretion in denying the further hearings. There has been no dramatic rise in natural resources income such as to warrant more hearings. In 1959 the NP natural resources had an estimated net income of $6.7 million. In the nine subsequent years, the natural resource net income has fallen below that figure six times (1960, 1961, 1962, 1964, 1965, 1966) and exceeded it only three times (1963, 1967, 1968). In 1963 the income was inflated by the use of a 13-month accounting period; and 1967 by inclusion of a nonrecurring $1 million bonus received.[44] Hence the actual resource income showed a meaningful increase only in 1968. One year's results do not require reopening as a matter of law. Significantly the average estimated net income from the NP natural resources from 1960-1968, even including the overly large totals for 1963 and 1967, is $6.7 million—precisely the same as earned in 1959. Nor has infla-

[44] Figures for 1959-1967 appear in NP's Supplemental Proxy Statement, issued February 15, 1968. Figures for 1968 are taken from an NP press release issued April 24, 1969.

tion, whatever its significance, had any material impact on these earnings.[45] In this context, inflation may mean only that it now costs more to turn the natural resources into dollars than before. The relative significance of the assets is unchanged. The fact that GN earned less in two recent years also does not require further hearings. GN, a large grain carrying road (Exh. 13, p. 9a), attributed substantial portions of its 1967 and 1968 revenue decrease to withholding of grain caused by depressed prices.[46] Even considering these two years, the average net incomes over the last five-year period shows, as noted, a $2.5 million edge for GN. Finally the improvement in stock market prices for NP said to have occurred is of no controlling significance. Insofar as market prices are relevant, they should be viewed over the long range. Many factors, not necessarily reflecting long-run strength of a company, influence day-to-day trading prices. As recently expressed in *N.Y., N.H. & H. R. Co. First Mortgage 4% Bondholders* v. *United States*, 68 Civ. 5200, decided June 18, 1969, slip opinion p. 29 (S.D.N.Y.) (Friendly, J.), where the issue involved market variations far beyond these present here, "spot fluctuations" in the market are not decisive of value. In short, the arguments pressed by the Committee involve fluctuations, peculiar situ-

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[45] Though NP negotiator MacFarlane may have treated inflation as an ordinary risk, the company's independent financial advisor did consider that factor in concluding that the terms were fair (Tr. 2461-2462).

[46] 1967 GN Annual Report to Stockholders, p. 4; 1968 GN Annual Report to Stockholders, p. 2.

ations, and short-term measurements. None materially affect the validity of a judgment based upon long-time performance.

III.

Contentions of the Livingston Committee and the City of Auburn Are Without Merit.

A. *Livingston*

Livingston is a Montana community of some 8,000 people served by NP and no other road (Exh. 15, p. 48). A one-railroad town with or without the merger, Livingston can claim no adverse competitive consequences from the consolidation. At the hearings, held prior to the current agreements guaranteeing job security, the Committee witnesses were concerned with job losses, resulting economic impact, and certain railroad operations. (Tr. 14014-14058). The testimony of these witnesses, local businessmen and NP employees, has now been abandoned by the Committee—apparently in deference to the subsequent agreements between the roads and labor. The Committee presently focuses upon arguments of another witness: a Washington, D. C., attorney who contended at the hearings, that the Northern Pacific Railway Co. lacked legal authority to merge because of defects in an 1896 foreclosure sale where it apparently acquired title to land-grant lands (constituting the right of way) formerly held by a predecessor corporation.

The examiner reviewed this and other Livingston arguments, concluding that they were without merit. (Ex. Rept., pp. 361-366). In its First Report, the

Commission stated that Northern Pacific Railway had acquired "rights" to the lands by virtue of the 1896 foreclosure (App. 70). In subsequently approving the merger, the Commission held that the transactions were "within the scope of Section 5(2)" of the Act, made the examiner's report a part of its order, and stated that contentions not specifically discussed in the Second Report—which included the "title" theory—were "considered and found without material significance" (App. 345-346, 496).

The Committee's "title" contention is no basis for reversal of this merger. To begin with, the effect and general validity of the foreclosure sale has been twice recognized by this Court. *Northern Pacific Ry. Co.* v. *Boyd*, 228 U.S. 482, 506 (1912); *United States* v. *Northern Pacific Ry. Co.*, 311 U.S. 317, 328 (1940). In *Boyd, supra*, while concluding that non-assenting creditors of the predecessor corporation might establish liens against assets of the successor, this Court held that the form of corporate reorganization which triggered the foreclosure sale was proper and not tainted by fraud (228 U.S. at 502-503); that the predecessor corporation was thereby "divested of the legal title" (228 U.S. at 506); and that "As between the parties and the public generally, the sale was valid" (228 U.S. at 506). Subsequently in *United States* v. *Northern Pacific Ry. Co., supra*, this Court, in describing the history of the road, stated (311 U.S. at 328):

> Pursuant to foreclosure proceedings the Northern Pacific Railway Company acquired title to the railroad, the land grant, and all other prop-

erty of the original corporation and has since operated the road and obtained patents for millions of acres under the land grants.

Additionally, the validity of the foreclosure sale has been recognized in two opinions of the Attorney General (21 Op. Atty. Gen. 486 (1897); 25 Op. Atty. Gen. 401 (1905)).

Moreover, the very arguments now presented by the Committee have previously been rejected on the grounds of laches. *Landell* v. *Northern Pacific Ry.*, 122 F. Supp. 253 (D. D.C. 1954), affirmed, 223 F.2d 316 (C.A. D.C.), cert. denied 350 U.S. 844. The Northern Pacific Railway has operated these properties, dealt with the public, and held itself out as a railroad for over 60 years. Clearly it is too late in the day to try title to the properties in question. This is especially so where, as here, the Committee seeks to litigate the matter collaterally—by way of attack upon an I.C.C. merger proceeding.

Third, the Commission has neither the power nor indeed the obligation to resolve "title" disputes as to assets involved in a Section 5 merger. The Commission is not a court and can make no definitive determination of such a controversy. Thus, the Commission has consistently declined to enter into disputes arising out of adverse claims to the property involved in a Section 5 transaction, or to delay its own proceeding for collateral resolution of such matters. See *O. C. Wiley & Sons* v. *United States*, 85 F. Supp. 542, 543-545 (W.D. Va., 1949), affirmed *per curiam*, 338 U.S. 902; *Walker* v. *United States*, 208 F. Supp. 388, 396 (W.D. Tex., 1962); *Interstate*

Investors, Inc. v. *United States*, 287 F. Supp. 374, 392, fn. 32 (S.D. N.Y., 1968), affirmed *per curiam*, 393 U.S. 479; *Watson Bros. Transp. Co.* v. *Jaffa*, 143 F.2d 340, 346 (C.A. 8, 1944).

Moreover, nothing in Section 5 requires that merging roads hold "title" to all properties involved. A merger applicant may operate another road under lease;[47] it may operate freight cars acquired through equipment trust, conditional purchase, or other security devices;[48] it may lease freight cars from other roads or from car-building companies. Yet it cannot seriously be urged that such critical assets are exempted from merger for lack of "title" in the "owning" road. The argument also lacks merit insofar as it rests upon the assumption that a railroad chartered by Congress cannot merge without some new grant of Congressional authority. The sweeping plenary authority granted to the Commission under Section 5(11) of the Act may well be regarded as sufficient Congressional authorization, if such be needed. Under all of these circumstances, the lower court properly rejected the effort of the Committee "* * * to raise for decision within the merger case a title case of great magnitude" (App. 55).[49]

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[47] *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 141 (1963); *Norfolk & W. Ry. Co. and New York, Chicago & St. L. R. Co. Merger*, 324 I.C.C. 1, 64 (1964).

[48] *Chicago, B. & Q. R. Co.* v. *New York, S. & Western R. Co.*, 332 I.C.C. 176, 200 (1968).

[49] The Committee's procedural arguments lack merit. The testimony and document offered by the attorney, as to the "title" theory, were properly regarded as more suitable for briefing than for evidentiary hearings (Tr. 14065, 14067). In

Finally, this Committee lacks standing to challenge the merger on the ground of the alleged defects in title. There is no allegation that the Committee holds stock in the predecessor corporation or is in any other way connected with the title dispute. Nor does the Committee possess independent definite legal interest sufficient to contest alleged non-compliance with statutes securing, for the benefit of the United States, the use of a railroad, at appropriate times, for postal, military, and other governmental purposes. *Cf.*, *Kerfoot* v. *Farmers' & Merchants' Bank*, 218 U.S. 281 (1910); *National Bank* v. *Matthews*, 98 U.S. 621 (1879). Significantly, the United States, beneficiary of the Congressional enactments relied upon by the Committee, has long recognized the validity of the foreclosure sale (opinions of Attorney General, *supra*), and does not itself press the issue. As noted, the Committee does not claim to represent the interest of any stockholders. But even such persons have standing only to raise issues affecting their financial interests as stockholders *per se*. *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 174-175 (1957); *Pittsburgh & W. Va. Ry* v. *United States*, 281 U.S. 479, 487-488 (1930). Lastly, the Committee cannot derive standing merely from its participation in the proceedings before the Commission. *Alex-*

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any event, the Committee was not injured by the ruling. As noted by the Commission in a separate report rejecting allegations of bias as to the examiner, the Committee ultimately submitted on brief "substantially all of the data tendered" (328 I.C.C. at 208). Regardless of form, the essence of the Committee's contentions were before the examiner, and were ruled upon by him.

ander Sprunt & Son v. *United States*, 281 U.S. 249, 254-255 (1930); *Pittsburgh & W. Va. Ry.*, *supra*.

B. *Auburn*

The City of Auburn, Washington, contends for reversal on the grounds that the further Commission hearing should have been expanded to embrace various subjects, and that the Commission's findings were somehow defective (Br., pp. 5-7). None of these arguments has merit.

The contentions based on the scope of the 1967 hearing were never even presented to the agency. Before the Commission, the City made no request for further hearings, and neither introduced, nor attempted to introduce anything at the further hearings which were held. Following these hearings, Auburn filed no brief; following the Commission decision approving the merger, Auburn filed no petition for reconsideration. In these circumstances the City cannot now be heard to contend for reversal on the theory that there should have been additional hearings. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952); *United States* v. *Capital Transit Co.*, 338 U.S. 286, 291 (1949).

Moreover, further hearings on the subjects stressed by Auburn were not necessary. The alleged impact of the instant merger upon the Denver and Rio Grande Western (Br., p. 6)—which does not even serve Auburn—was extensively examined by the Commission (App. 337-342, 471-475). The agency concluded that the matter could be satisfactorily handled by a broad reservation of jurisdiction, looking to

the fashioning of protective conditions necessitated by "cumulative or crossover problems" arising out of this and other mergers (App. 455-456, 479-480). This approach was plainly within breadth of discretion accorded to the Commission. *Cf.*, *Penn-Central Merger Cases*, *supra*, 389 U.S. at 514-515. Significantly, the Rio Grande itself, which earlier sought to delay the instant transaction pending consolidated hearings on several western merger proposals (App. 338-339), does not now oppose the Northern Lines merger.

Hearings as to alleged increases in Auburn property values (Br., p. 6), could scarcely have aided the City. Indeed this would serve only to corroborate the 1962 testimony of the Seattle economist who forecast substantial economic growth for Auburn, and considered this factor as offsetting any temporary disadvantage from the then-proposed (but subsequently changed) plan to abandon an Auburn NP yard (Tr. 6836). Even when the yard abandonment was assumed, the Commission found that the merger would have no serious long-range effect on Auburn. (App., p. 336). Subsequently, plans for abandonment of this facility were dropped.[50] *A fortiori*, therefore, the

[50] Affidavits explaining the Northern Lines' revised plans for Auburn were filed in another law suit, now stayed. *City of Auburn* v. *United States*, C.A. No. 7706, W.D. Wash. The lower court here particularly referred to the affidavit of NP's President (App. 53, fn. 24). The City does not challenge the affidavits, and has referred to the changed plans in the court below, and in this Court (Auburn District Court Brief, pp. 11-12; Auburn Jurisdictional Statement, p. 5; Auburn Brief, p. 5). The Northern Lines themselves are on record before

merger can hardly harm the City's property values. In any event, local interest in preservation of a particular rail facility cannot, as a matter of law, obstruct a consolidation consistent with the public interest. *Texas* v. *United States*, 292 U.S. 522 (1934). After merger, Auburn will have the services of three competing roads: the merged company, UP, and the newly strengthened Milwaukee. (Exh. 15, p. 81). This amounts to more rail service than presently currently available to many American cities with greater populations.

Nor was there any need for a hearing as to certain undescribed "train abandonment proposals" allegedly submitted by the Northern Lines at some time subsequent to the original merger hearings (Br., pp. 6-7). Auburn, like the communities which opposed the Penn-Central Merger, may assert its interests in these abandonments "in appropriate proceedings when such curtailment is specifically proposed." *Penn-Central Merger Cases, supra*, 389 U.S. at 504.[51]

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this Court as intending to retain and enlarge the Auburn facilities (Motion of Great Northern Ry. Co., et al. to Affirm, p. 5, fn. 3).

[51] The contention that the merger "* * * would reduce Auburn's freight service to one local train daily in each direction between Auburn and Yakima" (J.S. 3) is unfounded. Auburn does not challenge the affidavit of NP's General Superintendent of Transportation, that Auburn itself will be served by at least seven daily trains operated by the merged company—not to mention the service of UP and the Milwaukee as strengthened by this merger. For the merged company, service to or through Auburn will include five north-south trains and two east-west trains. Auburn's transcontinental traffic will move a short distance to Seattle where it will receive expedited east-west movement.

Alleged defects in the Commission's findings as to Auburn also were never brought to the agency's attention, but they are groundless in any event. The argument that there were no findings as to "specific" injury to Auburn (Br., p. 5) apparently refers to the once proposed closing of the NP yard. Because that plan was abandoned, as we have shown, the contention is wholly academic. In any event, the agency specifically mentioned Auburn (App. 335), finding (even when it appeared that the yard would be closed) that it and certain other communities would sustain only "temporary dislocations" and no long-range adverse impact (App. 335, 336). Nor did the Commission place any "burden of proof" on Auburn (Br., p. 7). The statement that—

> The record does not show, moreover, that the transportation requirements or the well-being of these areas and communities would best be served by denial of these applications (App. 336)—

was merely another way of expressing the conclusion of the next sentences: that there would be no long-range effect, and that the merger would actually benefit the communities. The statement was what it appears to be—a finding as to the state of "the record" and not any shift of the burden. The overall burden is, of course, on the railroads, and the Commission so recognized in explaining that it is the policy of the Act to facilitate mergers "which can be shown to be consistent with the public interest" (App. 312).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1, is as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), provides as follows in pertinent part:

> (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties therefore in separate ownership; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *

* * * *

(b) * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Comimssion shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * *

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carirers by railroad and the duly authorized representative or representatives of its or their employees.

* * * *

Section 5(9) of the Interstate Commerce Act, 49 U.S.C 5(9), provides as follows:

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order may under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

* * * *

Section 5(11) of the Interstate Commerce Act, 49 U.S.C. 5(11), provides as follows:

> (11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be con-

strued to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

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